

Case No. 25-584

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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*In re* THE PEOPLE OF THE STATE OF CALIFORNIA  
*Petitioner.*

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THE PEOPLE OF THE STATE OF CALIFORNIA  
*Petitioner - Plaintiff,*

— v. —

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA,  
*Respondent,*

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THE PEOPLE OF THE STATE OF CALIFORNIA, et al.,  
*Real-Parties-In-Interest – Plaintiffs,*

— v. —

META PLATFROMS INC., et al.,  
*Real-Parties-In-Interest – Defendants.*

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**ADDENDUM TO MOTION TO INTERVENE/JOIN**

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January 29, 2025

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE: SOCIAL MEDIA ADOLESCENT  
ADDICTION/PERSONAL INJURY  
PRODUCTS LIABILITY LITIGATION

This Document Relates to:  
  
All Actions

Case No. [22-md-03047-YGR](#) (PHK)

**ORDER GRANTING-IN-PART AND  
DENYING-IN-PART META’S  
REQUEST FOR PARTY DISCOVERY  
ON THIRD-PARTY STATE AGENCIES  
PURSUANT TO FED. R. CIV. P. 34  
AND GRANTING META’S FIRST,  
SECOND, AND THIRD  
ADMINISTRATIVE MOTIONS FOR  
LEAVE TO FILE SUPPLEMENTAL  
INFORMATION**

Re: Dkts. 685, 738, 1031, 1074, 1110

**INTRODUCTION**

This case is a multidistrict litigation between various private and public plaintiffs and social media defendants. Now before the Court is a dispute between Defendant Meta Platforms, Inc. (“Meta”) and those thirty-five State Plaintiffs who appear by, and in several cases are themselves, the Attorneys General of various states. Each State Plaintiff is represented by attorneys from the office of their respective State Attorney General. After Meta served requests for production of documents under Federal Rule of Civil Procedure 34 on the State Attorneys General, the Parties disputed whether or not certain identified state agencies should be subject to party discovery, and thus, whether the States Attorneys General should not only collect and produce documents from the Attorney General’s office but also from relevant custodians within the identified state agencies. [Dkt. 685]. The State Attorneys General all object to the document requests for a variety of reasons and, germane to the instant Order, they object to treating their respective state agencies as being subject to party discovery and insist that all of these agencies are third parties from whom Meta

1 should seek documents by subpoenas under Federal Rule of Civil Procedure 45. *Id.* at 8–10. Meta  
2 disagrees and contends that the Requests for Production served on the State Attorneys General are  
3 the proper vehicle for seeking documents from the identified agencies, and that forcing Meta to  
4 serve over 200 subpoenas duces tecum under Rule 45 is not justified and is overly burdensome.

5 Accordingly, the primary issue in dispute is whether the named State Plaintiffs have  
6 “control” for purposes of discovery over their respective state agencies’ documents. *See id.* at 6–7,  
7 9–10; *see also* Dkt. 738. After careful review of multiple rounds of briefing, the relevant legal  
8 standards, and oral argument at multiple hearings, the Court herein sets forth its conclusions of a  
9 state-by-state analysis to resolve whether and which named State Plaintiffs have control over their  
10 respective state agencies’ documents – and thus whether such documents are to be sought in  
11 discovery by requests for production under Rule 34 (party discovery) or by subpoenas under Rule  
12 45 (third party discovery). For the following reasons, Meta’s request to compel the State Plaintiffs  
13 to include their identified state agencies within the scope of party discovery is **GRANTED-IN-**  
14 **PART** and **DENIED-IN-PART**. [Dkts. 685, 738]

### 15 BACKGROUND

16 On February 23, 2024, Meta sent the State Attorneys General a list of state agencies “that  
17 may possess information relevant to the claims or defenses.” Dkt. 685 at 6. Meta served requests  
18 for production of documents under Rule 34 on the State Attorneys General on February 27, 2024.  
19 [Dkt. 686 at 1]. The Parties subsequently met and conferred, as required by this Court’s Standing  
20 Order for Discovery, regarding whether the Parties could reach negotiated resolution of the instant  
21 dispute. [Dkt. 685]. The Parties included discussion of this dispute in their Joint Status Report on  
22 Discovery filed on February 16, 2024. [Dkt. 617 at 17].

23 The Court heard oral argument on this issue at the Discovery Management Conference  
24 (“DMC”) held on February 22, 2024. *See* Dkt. 648. At that hearing, the Court ordered the Parties  
25 to submit a chart specifying the state agencies from whom Meta sought discovery, including an  
26 indication from the corresponding state Attorney General whether or not that state Attorney General  
27 would be representing the identified agencies for purposes of discovery in this case. *Id.* The Parties  
28 thereafter submitted the chart to this Court via email.

On March 15, 2024, the State Attorneys General and Meta filed a Joint Letter Brief setting forth their respective positions on this dispute over whether the state agencies should be subject to party discovery. [Dkt. 685]. The Parties identified this dispute as a “ripe” dispute in their Joint Status Report on Discovery filed on March 15, 2024. [Dkt. 686 at 8]. The Court heard oral argument on this dispute at the DMC held on March 18, 2024. *See* Dkts. 691, 699. On April 1, 2024, the State Attorneys General and Meta filed their Joint Supplemental Letter Brief on the issue of state agency discovery which included supplemental briefing on a state-by-state basis addressing arguments from each of the thirty-five State Attorneys General and Meta’s rebuttal to each. [Dkt. 738,]. As part of that Supplemental Letter Brief was the chart (previously lodged with the Court) identifying the specific state agencies at issue and the indication from each of the State Attorneys General whether or not their office would represent each such agency in discovery in this case. [Dkt. 738-1].

In the April 12, 2024, Joint Status Report on Discovery, the Parties requested guidance on whether they should be prepared for further oral argument on this dispute. [Dkt. 750 at 8]. By Order dated April 17, 2024, the Court directed the Parties to be prepared to discuss the extent to which additional oral argument regarding this dispute was needed or desired. [Dkt. 759]. At the April 22, 2024 DMC, the Court sought the Parties’ views on whether further oral argument was warranted in light of the record presented. *See* Dkts. 777, 782. While Meta did not seek further oral argument, certain State Attorneys General requested further oral argument. On April 24, 2024, pursuant to the Court’s instructions, the State Attorneys General filed a Notice indicating that the states of Arizona, California, New Jersey, and Pennsylvania requested the opportunity to present further oral argument. [Dkt. 787]. The Notice indicated that the “remainder of the State AGs will have their interests represented by a singular argument presented by a member of the State AGs MDL Co-Lead Counsel [unidentified in the Notice].” *Id.* at 2. On May 2, 2024, the State Attorneys General filed an amendment to the Notice, indicating that the “State AGs have reconsidered their position and respectfully amend their request” and indicated that only the states of Arizona, California, New Jersey, and Pennsylvania sought additional oral argument (and thus dropped the request for an additional, as yet unidentified, state Attorney General to also present argument on behalf of the

remainder of the states). [Dkt. 803 at 2]. The remaining State Attorneys General did not seek additional oral argument. *Id.* The Court heard additional oral argument from the Parties at a hearing on May 6, 2024. [Dkt. 818].

On July 24, 2024, the State Attorneys General filed an Administrative Motion for Leave to File Supplemental Information. [Dkt. 1031]. The Administrative Motion sought leave to file information that Meta had served a Notice of its intent to serve twenty-six subpoenas on some of the agencies at issue. *Id.* The Notice indicated that Meta was taking these steps without waiving its rights with regard to this pending dispute. On July 29, 2024, Meta filed its Response to the Administrative Motion, indicating that Meta did not object to the submission of these subpoenas as supplemental information. [Dkt. 1035]. Meta informed the Court that Meta served another twenty-six subpoenas on various state agencies on July 29, 2024. *Id.* at 2 n.1. Meta repeated its stated position that service of these subpoenas without waiving Meta’s position that the state agencies should be subject to party discovery. *Id.* at 2. On August 19, 2024, the State Attorneys General filed a Second Administrative Motion for Leave to File Supplemental Information. [Dkt. 1074]. This Second Administrative Motion sought leave to file information that Meta had served an additional Notice of its intent to serve an additional fifty-seven subpoenas on additional agencies at issue. *Id.* at 2. The Notice indicated that Meta takes no position with regard to this Second Administrative Motion. *Id.* at 6.

## LEGAL STANDARDS

The following legal standards apply to the Court’s analysis of the control issue for each of the states, discussed further below.

### I. CONTROL UNDER FED. R. CIV. P. 34

Rule 34 requires a party served with document requests to produce responsive, non-privileged documents which are in that party’s possession, custody, or control. Because Rule 34 is written in the disjunctive, control is a separate and sufficient basis for production; issues such as actual possession, legal ownership, and custody are distinct from the issue of control. *Soto v. City of Concord*, 162 F.R.D. 603, 619 (N.D. Cal. 1995) (finding the City of Concord has control of documents of non-employee psychiatrists who evaluated individual officer-defendants); *Bess v.*

1 *Cate*, No. 2:07-cv-1989 JAM JFM, 2008 WL 5100203, at \*1 (E.D. Cal. Nov. 26, 2008) (for control  
2 issue “legal ownership of the document is not determinative.”). The Ninth Circuit has held that  
3 “[c]ontrol is defined as the legal right to obtain documents on demand.” *In re Citric Acid Litig.*, 191  
4 F.3d 1090, 1107 (9th Cir. 1999) [hereinafter *Citric Acid*] (quoting *United States v. Int’l Union of*  
5 *Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989)) (concluding that legal control  
6 test is proper standard under Fed. R. Civ. P. 45). As the party seeking production of documents  
7 under Rule 34, Meta has the burden of proving that a State’s Attorney General has legal control over  
8 (*i.e.*, the legal right to obtain on demand) the identified State’s agencies’ documents. *Hitachi, Ltd.*  
9 *v. AmTRAN Tech. Co.*, No. C-05-2301-CRB (JL), 2006 WL 2038248 at \*1 (N.D. Cal. 2006) (citing  
10 *Norman v. Young*, 422 F.2d 470, 472–73 (10th Cir. 1970)).

11 In *Citric Acid*, the Ninth Circuit provided guidance on what is required to show a “legal right  
12 to obtain documents upon demand.” *Citric Acid*, 191 F.3d at 1107. In the factual situation in that  
13 case, the Ninth Circuit focused on whether or not there existed a contract “expressly giv[ing] . . . the  
14 right to obtain the records . . . upon demand.” *Id.* “[T]he cases are fairly uniform that a contractual  
15 obligation to provide documents is dispositive of the issue of control.” *Masimo Corp. v. Shenzhen*  
16 *Mindray Bio–Med. Elecs. Co.*, No. SA CV 12-02206-CJC (DFMx), 2015 WL 12912331, at \* 2  
17 (C.D. Cal. Apr. 17, 2015). The Ninth Circuit also explained that, in *Citric Acid*, there was an absence  
18 of “legal control” because the subpoenaed party “lacks the *legal ability* to obtain documents from”  
19 the third party. 191 F.3d at 1107 (emphasis added). Accordingly, based on *Citric Acid* then, either  
20 a contractual right or a legal ability to obtain documents are factors sufficient to show “legal control”  
21 over documents for purposes of Rule 34.

22 In *Citric Acid*, the Ninth Circuit further explained that an indicator of a lack of legal control  
23 occurs when the allegedly controlled third party can refuse to provide documents without legal or  
24 other repercussions:

25 C&L–US [(the subpoenaed party)] asked C&L–Switzerland [(the  
26 third-party allegedly under control)] to produce those documents, but  
27 C&L–Switzerland refused. There is no mechanism for C&L–US to  
28 compel C&L–Switzerland to produce those documents, and it is not  
clear how Varni wants C&L–US to go about getting the ECAMA  
documents, since C&L–Switzerland could legally —and without  
breaching any contract—continue to refuse to turn over such



documents.

*Citric Acid*, 191 F.3d at 1108.

Thus, under *Citric Acid*, a “mechanism” to compel the third party to produce the documents, such as an ability to enforce a legal duty under a contract, would demonstrate legal control (and in the facts of *Citric Acid*, no such contractual mechanism existed).

Subsequent to *Citric Acid*, the Ninth Circuit has not delineated with precision what other factors are sufficient to show a “legal right to obtain documents upon demand.” *See, e.g., In re Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. 167, 169 (N.D. Cal. 2001) (observing that while *Citric Acid*’s legal control test “has been accepted within this circuit in discussions of both Rule 34(a) and 45(a)[,] . . . there has been little discussion as to precisely what is meant by ‘legal right’ and ‘upon demand’”).

Courts agree that the *Citric Acid* legal control test is a fact specific inquiry. *See Perez v. State Farm Mut. Auto. Ins. Co.*, No. C-06-01962 JW (PSG), 2011 WL 1362086, at \*2 (N.D. Cal. Apr. 11, 2011) (“The determination of control is often fact-specific.”); *Miniace v. Pac. Maritime Ass’n*, No. C 04-03506 SI, 2006 WL 335389, at \*1 (N.D. Cal. Feb. 13, 2006) (“‘Legal right’ is evaluated in the context of the facts of each case.”). Because the inquiry is fact specific, no court has attempted to limit or compile all factors relevant to an analysis under the *Citric Acid* legal control test.

As a general matter, “[f]ederal courts have interpreted ‘control’ broadly.” *Hitachi*, 2006 WL 2038248, at \*1 (finding legal control and granting motion to compel Hitachi to search and produce documents from third party, Hitachi’s licensing agent Inpro); *Miniace*, 2006 WL 335389, at \*1 (“‘Control’ need not be actual control; courts construe it broadly as ‘the legal right to obtain documents upon demand.’”). “The definition of control under Rule 34 includes situations well beyond those which would permit a finding of *in personam* jurisdiction or liability based on an alter ego situation.” *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp. Inc.*, No. CV 14-03053 MWF (AFMx), 2018 WL 1157752, at \*21 (C.D. Cal. Mar. 2, 2018) (citation omitted).

Because determination of the issue of control is fact specific depending on the totality of circumstances, there are no fully exhaustive lists of factors which have been found relevant to



determining control. However, helpfully, at least one federal district court approaching this issue has surveyed the case law:

[T]here are a number of factors which may be distilled from case law which help to determine when documents in the possession of one corporation may be deemed under control of another corporation. These factors focus on the other corporation’s actual control or inferred control, including any “complicity” in storing or withholding documents. They include (a) commonality of ownership, (b) exchange or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation . . . . [B]ecause of the ownership situation, there often exists some intermingling of directors, officers, or employees, or business relations. Consequently, the subsidiary may be required to respond to a Rule 34 request which includes the parent company’s documents. Sister corporations are subject to the same analysis.

*Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306–07 (M.D.N.C. 1998) (internal citations omitted).

Further, as noted, the *Citric Acid* approach to control includes evaluation of whether there is a legal right to access the documents. *Citric Acid*, 191 F.3d at 1107. Accordingly, under a straightforward application of the “legal right” standard, where a statute (or similar legal mandate) provides a right to obtain documents, that statute or legal mandate has been held to be sufficient to demonstrate control over third party’s documents for purposes of discovery. *See In re ATM Fee Antitrust Litig.*, 233 F.R.D. 542, 544–45 (N.D. Cal. 2005) (“by federal statute, a bank holding company necessarily controls its subsidiary banks. . . . Therefore, if [third party] BANA or any other wholly-owned subsidiary bank of [defendant] BAC has possession and custody of documents responsive to Plaintiffs’ requests, then [defendant] BAC has legal control of the documents through its control of the [third-party] subsidiary bank and must produce any which are responsive to Plaintiffs’ Rule 34 requests.”). For purposes of establishing “legal control” over documents, “[d]ecisions from within this circuit have noted the importance of a legal right to access documents created by statute, affiliation or employment.” *In re Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. at 170 (emphasis added) (finding “legal control” and ordering party to obtain and produce transcript not within current possession where federal regulation, 17 C.F.R. § 203.6, grants legal right to ask for

and obtain transcript of testimony from SEC). Therefore, in the analysis of individual states below, the Court will consider whether there exists a statute or other legal mandate which satisfies the control test.

Despite their request for state-by-state briefing and separate opportunities for oral argument from each state, throughout the briefing and oral argument, the Attorneys General of the individual states raise several arguments that implicate the same or similar legal issues. The Court turns to these common legal issues and the legal standards applicable to all of the states’ objections to party discovery for their agencies and, to avoid prolixity, addresses them here instead of repeating them in the discussion of each state’s arguments.

## II. STATE LAW AND CONTROL UNDER FED. R. CIV. P. 34

The instant dispute involves document requests served upon governmental entities. However, the Court notes that precedent regarding the application of the control factors in the context of document requests made upon private corporations or entities may be illustrative. In a case involving the New York Attorney General, the Supreme Court held that “[i]f a State chooses to pursue enforcement of its laws in court, then it is not exercising its power of visitation and will be treated like a litigant. *An attorney general acting as a civil litigant must file a lawsuit, survive a motion to dismiss, endure the rules of procedure and discovery, and risk sanctions if his claim is frivolous or his discovery tactics abusive.*” *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 531 (2009) (emphasis added). The Ninth Circuit has held that “[w]hen the government is named as a party to an action, it is placed in the same position as a private litigant, and the rules of discovery in the Federal Rules of Civil Procedure apply.” *Exxon Shipping Co. v. U.S. Dep’t of Int.*, 34 F.3d 774, 776 n.4 (9th Cir. 1994). Not surprisingly then, the fact that this case involves governmental entities rather than private entities does not materially change the legal or analytical approach to the control issue.

Nevertheless, the Court is cognizant that governmental agencies differ from private entities in certain ways, as stressed by the state Attorneys General. These differences are accounted for in the analyses below. However, because the Court is not relying on the law of private corporations or corporate governance to analyze the control issue here, the differences are not in and of

1 themselves outcome determinative of the inquiry. For example, the fact that private corporations  
2 are legal entities formed under state law, whereas the state Attorney General is (typically) an office  
3 created by a state constitution, has little bearing on distinguishing precedent on the issue of control.  
4 Other than pointing out these kinds of public/private differences, the Attorneys General do not  
5 demonstrate how or why the legal precedent cited are distinguishable based on the legal (or  
6 constitutional) source of creation of the entities for deciding the control issue. From the Court's  
7 review, the precedent relevant to the issues here do not apply a different legal control test based on  
8 whether an entity is a for-profit business as opposed to a governmental agency or officer.

9 Because the inquiry for control is fact-specific, courts have examined the state's  
10 constitutional or statutory scheme as part of the totality of circumstances when deciding whether  
11 one governmental entity has control over the documents of another governmental entity. *See, e.g.,*  
12 *United States v. Am. Express Co.*, No. 10-CV-04496-NGG (RER), 2011 WL 13073683 (E.D.N.Y.  
13 July 29, 2011) [hereinafter *Amex*]; *Bd. of Educ. of Shelby Cnty., Tenn. v. Memphis City Bd. of Educ.*,  
14 No. 2:11-CV-02101-SHM, 2012 WL 6003540 (W.D. Tenn. Nov. 30, 2012), *supplemented*, No.  
15 2:11-CV-02101-SHM, 2012 WL 6607288 (W.D. Tenn. Dec. 18, 2012); *Washington v. GEO Grp.,*  
16 *Inc.*, No. 3:17-CV-05806-RJB, 2018 WL 9457998, at \*3 (W.D. Wash. Oct. 2, 2018); *In re Generic*  
17 *Pharms. Pricing Antitrust Litig.*, 571 F. Supp. 3d 406 (E.D. Pa. 2021) [hereinafter *Generic*  
18 *Pharmaceuticals (I)*]; *Illinois ex rel. Raoul v. Monsanto Co.*, No. 22 C 5339, 2023 WL 4083934  
19 (N.D. Ill. June 20, 2023) [hereinafter *Monsanto*]; *In re Generic Pharms. Pricing Antitrust Litig.*,  
20 699 F. Supp. 3d 352 (E.D. Pa. 2023) [hereinafter *Generic Pharmaceuticals (II)*].

21 Ultimately, the control issue under Rule 34 is governed by federal law. A federal district  
22 court has the authority under federal law to order disclosure of documents in discovery in civil  
23 actions, notwithstanding state law which put limits on such disclosure. *Gonzales v. Spencer*, 336  
24 F.3d 832, 834–35 (9th Cir. 2003) (Although state law limited prosecutor's access to juvenile records,  
25 "the court could have ordered disclosure notwithstanding state law[.]"). District court opinions have  
26 recognized that a state law restriction on producing documents is not a barrier to a finding of control,  
27 and thus, have ordered production of a third-party agency's documents as part of party discovery.  
28 *See, e.g., Doe v. Cnty. of Santa Clara*, No. 15-cv-01725-EJD (HRL), 2015 WL 14073467, at \*1

(N.D. Cal. Nov. 30, 2015) (“Federal courts may grant lawyers permission to view juvenile case files in spite of California’s contrary confidentiality laws, however, because federal privilege law controls who may access evidence”); *Evans v. City of Tulsa*, No. 08-CV-547-JHP-TLW, 2009 WL 3254907, at \*2 (N.D. Okla. Oct. 7, 2009) (ordering the defendant municipality in case involving both federal and state law claims to produce documents from three agencies (county clerk, district attorney, and Family and Children Services) and stating that “[i]n federal questions cases, federal courts are not bound by state statutes which impose limits on the discovery process”).

Similarly, federal regulations, even when interpreted with the force of law, cannot be enforced if they purport to override the Federal Rules of Civil Procedure. *In re Bankers Tr. Co.*, 61 F.3d 465, 470–71 (6th Cir. 1995) [hereinafter *Bankers Trust*]. In *Bankers Trust*, the Federal Reserve Board refused to produce documents because a federal regulation barred their production absent following procedures to request such documents via separate action in district court in Washington, D.C. *Id.* at 469. The *Bankers Trust* opinion analyzed the conflict between the federal regulation and Rule 34, and concluded that the Federal Rules of Civil Procedure govern whether the documents should be produced:

We likewise conclude that Congress did not empower the Federal Reserve to prescribe regulations that direct a party to deliberately disobey a court order, subpoena, or other judicial mechanism requiring the production of information. We therefore hold that the language in 12 C.F.R. § 261.14 that requires a party that is served with a subpoena, order, or other judicial process to continually decline to disclose information or testimony exceeds the congressional delegation of authority and cannot be recognized by this court. Such a regulation is plainly inconsistent with Rule 34 and cannot be enforced. To allow a federal regulation issued by an agency to effectively override the application of the Federal Rules of Civil Procedure and, in essence, divest a court of jurisdiction over discovery, the enabling statute must be more specific than a general grant of authority as found here.

Moreover, we find no compelling reason to discard the relatively straightforward discovery methods outlined in the Federal Rules of Civil Procedure simply because the Federal Reserve has attempted to mandate a different procedure.

*Id.* at 470–71.

Analogously, the Supreme Court has recognized that discovery in a federal civil action is controlled by federal law, and that a finding of control over documents cannot be disregarded even

1 in situations where foreign law would potentially impose criminal sanctions for producing the  
2 documents. *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v.*  
3 *Rogers*, 357 U.S. 197, 205–06 (1958). Thus, discovery laws and corporate laws rooted in a different  
4 sovereign are insufficient to override the application of the “legal control” test. control. *Japan*  
5 *Halon Co. v. Great Lakes Chemical Corp.*, 155 F.R.D. 626, 627 (N.D. Ind. May 28, 1993) (finding  
6 subsidiary has control over parent corporation documents and rejecting an argument that  
7 “international interpretation of its corporate structure and the Japanese discovery law result in the  
8 conclusion that it does not have the requisite control over documents in possession of its parent  
9 companies”). Furthermore, the *Uniden* Court explained that “[t]he expanded definition of control  
10 under Rule 34 was signaled by the Supreme Court’s decision in *Societe Internationale*.” *Uniden*,  
11 181 F.R.D. at 306. As the *Uniden* Court explained further:

12 This [Supreme Court] language indicates a direction to lower courts  
13 to closely examine the actual relationship between two corporations  
14 and guard against not just fraud and deceit, but also sharp practices,  
15 inequitable conduct, or other false and misleading actions whereby  
16 corporations try to hide documents or make discovery of them  
difficult. Certainly, this broad construction of Rule 34 is consonant  
with American civil process which puts a premium on disclosure of  
facts to ascertain the truth as the means of resolving disputes.

17 *Id.*

18 In the same regard, the Ninth Circuit has held that a federal statute (and federal regulations  
19 promulgated thereunder) cannot serve as a basis for a government agency to refuse to provide  
20 discovery. *Exxon Shipping*, 34 F.3d at 776–78 (rejecting government agencies’ refusals of  
21 subpoenaed depositions based on both federal statute and regulations). The Ninth Circuit held long  
22 ago that agency regulations (and the statutes under which the regulations were promulgated) are not  
23 proper barriers to production of documents where control has been found. *Harvey Aluminum (Inc.)*  
24 *v. N.L.R.B.*, 335 F.2d 749, 753 (9th Cir. 1964) (“Whether the compulsion of the rule [for an agency  
25 to produce documents] is constitutional or statutory, the Board may not avoid it by adopting  
26 regulations inconsistent with its requirements.”).

27 The import of these precedents is that, if a court finds control over documents, then neither  
28 federal statute nor federal regulation (nor foreign law) are a legal bar to application of Rule 34 and

1 requiring production based on that finding of control. To the extent the state Attorneys General  
2 argue that a state statute would excuse or bar production of the agencies' documents even where the  
3 Court finds control, then for similar reasons that argument is legally unsound. Here, the Multistate  
4 Complaint asserts claims under the Federal Children's Online Privacy Protection Act ("COPPA")  
5 on behalf of all the Filing States. *See California v. Meta Platforms, Inc.*, No. 23-cv-05448, at Dkt.  
6 1, ¶¶ 851-59 (N.D. Cal. Oct. 24, 2023) [hereinafter Multistate Complaint]. "[I]n cases presenting  
7 federal questions, such as here, *discoverability*, privileges and confidentiality *are governed by*  
8 *federal law*, not state law." *Garner v. City of New York*, No. 17-CV-843 (JGK)(KNF), 2018 WL  
9 5818109, at \*3 (S.D.N.Y. Oct. 17, 2018) (civil rights case asserting both federal and state law causes  
10 of action) (emphasis added).

11 While courts have considered the impact of state constitutions and state laws in analyzing  
12 the issue of control where governmental entities are involved, comity-based arguments do not  
13 require a finding of a lack of control as a matter of law. Precedent makes clear that notions of comity  
14 or arguments about the supremacy of state law (including even a co-pending state court proceedings)  
15 are not sufficient to bar a party seeking discovery in a federal court under federal law. *In re*  
16 *PersonalWeb Techs., LLC Pat. Litig.*, No. 18-md-02834-BLF, 2022 WL 19833889, at \*1 (N.D. Cal.  
17 Apr. 12, 2022) (rejecting comity arguments as bases to bar motion to compel enforcement of third  
18 party subpoenas in federal court where state law receivership action was co-pending and noting that  
19 "[i]t is settled law that state courts have no authority to bar – by injunction or otherwise – the  
20 prosecution of *in personam* actions in federal courts").

### 21 **III. SEPARATION AND INDEPENDENCE OF A STATE ATTORNEY GENERAL** 22 **FROM THE EXECUTIVE BRANCH OF THE STATE**

23 The state Attorneys General all argue, using almost identical verbiage, that the office of their  
24 state Attorney General is either a separate constitutional officer, separately elected, and/or with  
25 separate spheres of authority which make that office independent from the local office of the  
26 Governor, which includes all the identified state agencies within the executive branch of that State.  
27 *See* Dkt. 685 at 9–10. This argument relies on either the state constitution or state laws defining the  
28 roles of the different state officers, and as such, the above discussion regarding how state law does



1 not override federal law applies with equal force. Further, based on this separation of powers  
2 argument, the state Attorneys General argue that they are not the state officers ultimately overseeing  
3 the state agencies (the Governor being that officer). They argue, for that reason, that the state  
4 Attorneys General have no control over those agencies. *Id.* at 10. Indeed, some courts deciding a  
5 control issue in the context of governmental entities have put weight on the separation of powers  
6 issue under the facts of established there. *In re Gold King Mine Release in San Juan Cnty.*, No.  
7 1:18-MD-02824-WJ, 2020 WL 13563527 at \*3–4 (D.N.M. Dec. 23, 2020).

8 However, with further examination, these arguments focusing on a dual executive under a  
9 state constitution (from which stems the separation of powers between a state Attorney General and  
10 a state Governor) are not entirely persuasive. Corollary arguments that the state Attorneys General  
11 have no executive authority over the state agencies (such as “[t]hey do not set agency priorities,  
12 cannot discipline agency employees”) are equally unpersuasive. *See* Dkt. 685 at 9–10. These  
13 arguments ignore the reality that the “legal control” issue for discovery arises when there are two  
14 legally distinct or separate entities. If the mere fact that two separately constituted or formed entities  
15 were enough to defeat control, then there would almost never be a finding of control. Indeed, in the  
16 analogous situation where two “sister corporations” are involved, courts have found control of one  
17 entity over the documents of another. *See Uniden*, 181 F.R.D. at 307–08 (finding control as between  
18 two “sister corporations” where neither was under the corporate authority of the other). This  
19 illustrates the point: if one of two “sister corporations” can be found to have control over documents  
20 of the other, then for the same reasons, one of two parts of a split or dual executive can be found to  
21 have control of documents of the other.

22 The state Attorneys General emphasize the separateness of the agencies from the Attorney  
23 General without explanation as to how specifically that separation affects control as to the  
24 documents at issue. If only one entity were involved, then by definition that single entity would  
25 “possess” the documents under Rule 34 and the disjunctive issue of control would not arise.  
26 *Illumina Cambridge Ltd. v. Complete Genomics, Inc.*, No. 19-mc-80215-WHO (TSH), 2020 WL  
27 820327, at \*8–9 (N.D. Cal. Feb.19, 2020). Whether or not there is a “dual executive” or separation  
28 of powers is not by itself dispositive of the control issue. Analogously, in the context of corporate



1 entities, lack of ownership interests by one corporation of another is not sufficient to defeat a finding  
2 of control. *See QC Labs v. Green Leaf Lab LLC*, No. 8:18-cv-01451-JVS (JDEx), 2019 WL  
3 6797250, at \*8–9 (C.D. Cal. July 19, 2019) (finding control even though two entities “are not in a  
4 parent-wholly owned subsidiary relationship, nor do the two entities have identical ownership  
5 structure”). To the extent some precedent cited by the state Attorneys General have relied on policy-  
6 based reasons rooted in comity for finding a lack of control by an Attorney General over a state  
7 agency, those decisions are distinguishable because they do not apply the Ninth Circuit’s *Citric Acid*  
8 test (for example, state Attorneys General cite a state intermediate appellate court opinion, *People*  
9 *ex rel. Lockyer v. Superior Ct.*, 19 Cal. Rptr. 3d 324 (Cal. Ct. App. 2004), which did not apply Rule  
10 34); they involve a factual record different from the record here; and they appear not to involve or  
11 consider factors such as commonality of counsel, commonality of interests, or the discussion of the  
12 supremacy of federal law in this inquiry (informed at least in part by the Supreme Court’s directive  
13 in *Societe Internationale* and the cases cited above). [Dkt. 685 at 9–10].

14 The existence of a separation of powers between a state Attorney General and a Governor  
15 may be a factor in the control analysis, but that factor does not necessarily preclude the Attorney  
16 General’s legal right to access to state agency documents. The logical fallacy of the “separation of  
17 powers” argument is that this concept concerns distinct spheres of governmental authority to act  
18 within their roles as arms of the government and does not necessarily impact whether or not there is  
19 control of documents for purposes of discovery. To be clear, control under Rule 34 is a discovery  
20 concept and is not subject of the exact same conceptual bounds of “corporate control” (as a parent-  
21 subsidiary) or “operational control” (such as setting agency policy or disciplining agency  
22 employees, as the state Attorney Generals argue). Where one entity is under the day-to-day  
23 operational control of another, that factual situation has been found to be a factor in finding control,  
24 because such unfettered power to control all the operations of another entity would indicate a legal  
25 right to obtain the documents (again, such as in a parent-subsidiary situation). *See In re ATM Fee*  
26 *Antitrust Litig.*, 233 F.R.D. at 545; *see also LG Display Co., Ltd. v. Chi Mei Optoelectronics Corp.*,  
27 No. 08CV2408-L (POR), 2009 WL 223585, at \*3 (S.D. Cal. Jan. 28, 2009) (“Numerous courts have  
28 concluded that a parent corporation has a sufficient degree of ownership and control over a wholly-

owned subsidiary that it must be deemed to have control over documents located with that subsidiary.”).

But, the converse is not necessarily true: lack of operational, day-to-day control of an entity does not end the inquiry, as the state Attorneys General argue – otherwise, control would never be found in situations except those involving a parent-subsidary or similar direct-control type of relationship. For example, in *Choice-Intersil Microsystems, Inc. v. Agere Sys.*, the Court found that a subsidiary corporation had control of the documents of its parent corporation for purposes of discovery, despite the fact that the subsidiary by definition lacked corporate or operational control over the parent corporation. *Choice-Intersil Microsystems, Inc. v. Agere Sys.*, 224 F.R.D. 471, 472–73 (N.D. Cal. 2004) (finding subsidiary has control of documents of parent corporation); *see also Uniden*, 181 F.R.D. at 307–08 (finding control as between two “sister corporations” where neither was under the corporate authority of the other). “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc. v. Janssen-Counotte*, 305 F.R.D. 630, 638 (D. Or. 2015). Here, the attorney-client relationship between the state Attorneys General and their respective state agencies (a relationship mandated by state law) necessitates close coordination. Thus, although operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “managerial power” in terms of day-to-day operations or policy making is not determinative for evaluating “control” for purposes of discovery.

Similarly, to the extent the State Attorneys General argue that they lack “unfettered access” or some otherwise unbounded right to access state agencies’ documents, such argument is legally incorrect. A determination of “control” of documents, for purposes of Rule 34, does not require showing “unfettered access” to all state agencies’ documents under all circumstances. *Monsanto*, 2023 WL 4083934, at \*5 (“Despite the State’s characterization of the issue, we need not decide whether the Illinois Attorney General has “unfettered access to all state agencies’ records under all circumstances.” Rather, the issue is one of “control” under Rule 34 – nothing more, nothing less.”). Further, the state Attorneys General implicitly assume an overly restrictive view of the control test for documents under Rule 34. To the contrary, courts have recognized that control for purposes of

document discovery is liberally construed. *E.g.*, *Miniace*, 2006 WL 335389, at \*1; *Evans v. Tilton*, No. 1:07CV01814 DLB PC, 2010 WL 1136216, at \*1–2 (E.D. Cal. Mar. 19, 2010); *Inland Concrete Enterprises, Inc. v. Kraft Americas LP*, No. CV 10-1776-VBF (OPX), 2011 WL 13209239, at \*3–4 (C.D. Cal. Feb. 3, 2011).

Indeed, control of documents in the split-governmental context is amply demonstrated by a Western District of Tennessee decision. *Bd. of Educ. of Shelby Cnty., Tenn.*, 2012 WL 6003540, at \*3. In that case, the Court found that the Tennessee Attorney General had control of the documents of the “Tennessee General Assembly, its legislators, representatives, or agents” – despite the fact that the state’s legislature is not under executive control or authority of the state’s Attorney General. *Id.* Clearly, under the Tennessee state constitution, the Attorney General does not exert supervisory control over the Tennessee legislature. But that factor was not determinative of the control issue for documents under Rule 34. “Control” for purposes of discovery is not coterminous with the concept of “functional control” or “political control”.

Ultimately, the argument that state agencies are outside a state Attorney General’s executive authority is merely another way to restate that there are two distinct entities involved. Seen for what it is, that argument amounts to nothing more than restating the issue to be decided, without helping to decide the issue. Similarly, arguing that the state agencies are independent because there is a “divided executive” under a state constitution again improperly conflates the “legal control” issue for discovery of documents with “operational control” or “functional independence.” Under the legal standards discussed, the Court finds these arguments and these alleged factors to be ultimately unhelpful in determining whether or not there is control for purposes of discovery, because these arguments beg the issue and as such are not outcome determinative of the control issue.

#### **IV. COMMONALITIES BETWEEN THE STATES, THE STATE ATTORNEYS GENERAL, AND THE STATE AGENCIES**

There are thirteen cases in this Multi-District Litigation in which the States themselves are the named plaintiffs and in which the Attorney General of that State is not named as co-plaintiff (but is rather counsel representing the plaintiff). *See* Multistate Complaint (naming California, Connecticut, Idaho through its Attorney General, Illinois, Indiana, Kentucky, Louisiana, Maine,

Minnesota by its Attorney General, New York by its Attorney General, Pennsylvania by its Attorney General, Rhode Island, and Wisconsin as plaintiffs). Further, there are nineteen cases in this Multi-District Litigation in which both the State itself and the Attorney General (as relator) are the named co-plaintiffs, and thus both entities are represented by the Attorney General of that State. *Id.* (naming “*ex rel.*” the Attorney Generals of Arizona, Colorado, Delaware, Georgia, Hawai’i, Kansas, Michigan, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Virginia, Washington, and West Virginia); *see also Montana v. Meta Platforms, Inc.*, No. 24-cv-00805, at Dkt. 1 (N.D. Cal. Dec. 1, 2023) (Montana Complaint naming “State of Montana, *ex rel.* Austin Knudsen, Attorney General” as “Plaintiffs”); *see also U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 481 F. Supp. 2d 815, 823 n.6 (S.D. Tex. 2007) (“the Fifth Circuit has expressly held that relator is a party to the suit.”); *accord Power Authority ex rel. Solar Liberty Energy Sys. v. Advanced Energy Indus.*, No. 19-CV-1542-LJV-JJM, 2024 WL 957788, at \*2 (W.D.N.Y Mar. 6, 2024).

In all thirty-two cases, the State itself is a party to the suit. Courts have found that discovery obligations extend to other government agencies even if they are non-parties based on the recognition that the State (or the government as a whole) is essentially the real party in interest and thus the discovery obligation extends to the entire government. In an analogous case involving an order for the production of documents from a non-party agency proceeding, the Ninth Circuit held that:

[t]he rationale of the rule [requiring production of the documents, witness statements] . . . applies with equal vigor whether the statements are in the possession of the agency conducting the hearing ***or of another agency of the government*** . . . . The [National Labor Relations] Board, the Department of Justice, and the Department of Labor are all parts of the government of the United States. The proceedings which the Board initiated against petitioners were public proceedings, undertaken on behalf of that government to enforce a public Act. In a criminal prosecution the Department of Justice would scarcely be heard to say that it was not required to produce statements otherwise within the rule ***simply because the documents rested in the hands of another federal agency***, and we perceive no valid distinction, for this purpose, between that case and this one.

*Harvey Aluminum*, 335 F.2d at 754 (citations omitted) (emphasis added); *cf. also Bank Line v. United States*, 76 F. Supp. 801, 803–04 (S.D.N.Y. 1948) (ordering production of documents from

1 non-party, the Department of the Navy, noting that “[t]he several departments are all agencies of  
2 one government, possessed, theoretically, at least, of a single will” where “suit is prosecuted by the  
3 Department of Justice for the benefit of the Treasury Department, and that the Navy Department [is]  
4 not exercising any discretion as to institution of litigation.”).

5 This rationale has been applied to the governments of other nation states, such as in a case  
6 involving Ghana: “When an agency of government institutes suit, any obligation to disclose relevant  
7 information extends to the government Qua government requiring disclosure of all documents in its  
8 possession, custody or control, not just those materials in the immediate possession of the particular  
9 agency-plaintiff.” *Ghana Supply Comm’n v. New England Power Co.*, 83 F.R.D. 586, 595 (D. Mass.  
10 1979).

11 Under different factual situations, state agencies have been found to be agents of their  
12 respective States. *See, e.g., San Francisco NAACP v. San Francisco Unified School Dist.*, 484 F.  
13 Supp. 657, 667 (N.D. Cal. 1979) (collecting cases which “have found liability [of a State] under an  
14 agency theory” involving school boards); *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp.  
15 568, 586–87 (N.D. Cal. 1981), *aff’d*, 693 F.2d 84 (9th Cir. 1982) (“Air travelers require ground  
16 transportation and it would follow that the [airport operating agency Air] Board, as the agent of the  
17 state in performing this function, would have a duty to provide adequate and reliable services.”)  
18 (quoting *Padgett v. Louisville & Jefferson Cnty. Air Bd.*, 492 F.2d 1258, 1260 (6th Cir. 1974)); *San*  
19 *Francisco Unified Sch. Dist. v. Johnson*, 479 P.2d 669, 677 (Cal. 1971) (“the state [of California]  
20 has created local school districts, whose governing boards function as agents of the state.”);  
21 *Crumpler v. Bd. of Admin.*, 108 Cal. Rptr. 293, 305 (Cal. Ct. App. 1973) (finding Board of  
22 Administration of Public Employees’ Retirement System and city of Mendocino “were agents of  
23 the state [of California]” in administering that retirement system). A principal-agent relationship  
24 has been held to be a factor that supports a finding of control for purposes of discovery. *Lofton v.*  
25 *Verizon Wireless (VAW) LLC*, No. 13-cv-05665-YGR (JSC), 2014 WL 10965261, at \*2 (N.D. Cal.  
26 Nov. 25, 2014); *Hitachi*, 2006 WL 2038248 at \*1; *Rosie v. Romney*, 256 F. Supp. 2d 115, 118 (D.  
27 Mass. 2003). Meta argues that the agencies at issue are under the control of their respective State,  
28 and therefore subject to party discovery. *See* Dkt. 685 at 6–7 (citing cases).

1           However, the state Attorneys General argue that other courts have recognized that Rule 34  
2           should not be interpreted to allow party discovery of every agency of a state government, merely  
3           because suit was filed in the name of the State absent a showing of some other factors demonstrating  
4           control. *Id.* at 9 (citing cases). As with other factors impacting the control issue, the case law makes  
5           clear that this factor is one among the totality of circumstances to be considered in deciding whether  
6           or not there is control. *See Colorado v. Warner Chilcott Holdings*, No. 05-02182, 2007 WL  
7           9813287, at \*4 (D.D.C. May 8, 2007) (The Court “will not aggregate separate state governmental  
8           agencies without a strong showing to the contrary by Defendants[.]”). The *Amex* opinion followed  
9           *Warner Chilcott Holdings* in finding that the state Attorneys General lacked control over their  
10          respective agencies’ documents because that court granted “great deference” to the dual executive,  
11          separate agency factors. *Amex*, 2011 WL 13073683, at \*2. As recognized by *Warner Chilcott*  
12          *Holdings*, court can take this factor into account under the totality of the circumstances for  
13          evaluating control for each state. *Warner Chilcott Holdings*, 2007 WL 9813287, at \*4

14          A more specific concept of “independence” involves the state Attorney General’s  
15          independent discretion to file a lawsuit. The state Attorneys General argue that, by pursuing these  
16          civil enforcement actions, the state Attorneys General are acting within their exclusive independent  
17          authority under their state constitutions and that this independent prosecutorial authority does not  
18          require involvement of any state agencies (with exceptions for certain states where specific agencies  
19          are, in fact, required to approve and proceed with the litigation). The *Generic Pharmaceuticals (II)*  
20          Court rejected the argument that, because the Attorney General was suing as an independent agency,  
21          it necessarily lacked control over other agencies’ documents. *Generic Pharmaceuticals (II)*, 699 F.  
22          Supp. 3d at 358. As that Court noted, the District of Columbia’s “Attorney General has ‘broad  
23          power to exercise all such authority as the public interest requires’ and has ‘wide discretion in  
24          determining what litigation to pursue to uphold the public interest, absent specific constitutional or  
25          statutory guidance to the contrary.’” *Id.* The *Generic Pharmaceuticals (II)* Court reasoned that  
26          “[t]his broad authority, in the context of litigation where the AGO is representing the District of  
27          Columbia, does not support the position that the AGO cannot exercise its authority to obtain  
28          documents from other agencies.” *Id.*



1           Conversely, in *Amex*, that Court relied on the factor that “the decision to pursue an  
2 enforcement action against Amex was one of policy, made independently of the State Governors  
3 and state agencies” as a basis to find a lack of control. *Amex*, 2011 WL 13073683, at \*2. However,  
4 the *Amex* Court failed to address or apparently consider the point considered by the *Generic*  
5 *Pharmaceuticals (II)* opinion: such broad authority on the part of the state Attorneys General (in  
6 filing the litigation) would in fact be consistent with having a right to exercise authority to obtain  
7 documents from other agencies (and at least would be inconsistent with a lack of such authority).  
8 *Compare Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 358, with *Amex*, 2011 WL 13073683, at  
9 \*2.

10           Indeed, courts have found when a state Attorney General initiates litigation on behalf of the  
11 state, and thus exercises authority to file a lawsuit *parens patriae*, that Attorney General has legal  
12 control over agency documents. *See, e.g., GEO Grp., Inc.*, 2018 WL 9457998, at \*3 (“In this Court’s  
13 view, where the plaintiff is the State of Washington, discovery addressed to the State of Washington  
14 includes its agencies. Because the AGO is the law firm to the State of Washington, the AGO should  
15 respond to and produce discovery on behalf of the State of Washington, including its agencies.”);  
16 *Compagnie Francaise d’Assurance Pour le Com. Exterieur v. Phillips Petroleum Co.*, 105 F.R.D.  
17 16, 35 (S.D.N.Y. 1984) (where an “agency of government institutes suit, any obligation to disclose  
18 relevant information extends to the government qua government requiring disclosure of all  
19 documents in its possession, custody or control, not just those materials in the immediate possession  
20 of the particular agency-plaintiff”); *see also United States v. AT&T*, 461 F. Supp. 1314, 1333–34  
21 (D.D.C. 1978) (“The Attorney General . . . [is] responsible for instituting and conducting the  
22 criminal and civil litigation of the United States[]” “it hardly seems reasonable to insulate the entire  
23 government, other than the Attorney General’s Office, from the direct discovery process.”).

24           Similarly, many of the state Attorneys General argue that the non-party agencies are not  
25 parties to this case, and thus they are by definition not subject to party discovery. The short response  
26 to this circular argument is that Rule 34 reaches non-parties where there is control, so a third party’s  
27 status as a third party to the case is no basis on which to find a lack of control. This argument  
28 ignores the many cases in which a non-party was found properly subject to party discovery under



1 Rule 34 because the named party had control over the non-party’s documents. *See, e.g., League of*  
2 *United Latin Am. Citizens v. Abbott*, No. 21-CV-00299, 2022 WL 1540589 at \*1–2 (W.D. Tex. May  
3 16, 2022) (“In many examples the United States points to, Texas has demonstrated its control over  
4 documents held by non-party agencies or officials . . . . The Court finds that Texas has control over  
5 documents and ESI that are held by [the Office of the Governor], [the Office of the Attorney  
6 General], and any other executive agency known to the State to be in the possession, custody, or  
7 control of relevant documents. Because Texas has control over these items, it must produce the  
8 items responsive to the United States’ Rule 34 production request.”).

9 **V. “VIRTUAL VETO”**

10 Throughout their briefs and at oral argument, the state Attorneys General stressed the  
11 “dual/divided executive” of their constitutional structures of their local governments. The Court is  
12 mindful of the nature of state governance and has taken it into account as appropriate. Indeed, courts  
13 have discussed the unique positions in which state Attorneys General sit within a state government.  
14 *Amex*, 2011 WL 13073683, at \*3. Focusing on the independent authority of a state Attorney General  
15 as compared to the separate authority of the remainder of the executive branch, the *Amex* Court  
16 found that state Attorneys General lacked control over their respective state agencies’ documents  
17 based on the risk of the agencies having a potential “virtual veto” on their state Attorney General:

18 It is not for this court to interfere with the State Attorneys General’s  
19 ability to exercise their state constitutional power to bring an  
20 enforcement lawsuit absent gubernatorial approval. To find that the  
21 State Attorneys General have control over the documents in  
22 possession of state agencies that operate wholly independently of the  
23 State Attorneys General would be giving the Governors’ Offices and  
24 state agencies a ‘virtual veto’ over the policy decision to bring an  
25 enforcement action that rightfully lies with the State Attorneys  
26 General.”

27 *Id.* The state Attorneys General rely on this “virtual veto” argument in this Multi-District Litigation.

28 Upon further examination, the “virtual veto” argument is speculative as to why and how an  
agency’s actions in responding to discovery would rise to the level of the hypothetical “virtual veto”  
over litigation. The *Amex* opinion does not adequately explain how treating a non-party agency as  
subject to party discovery would, by itself, result in a state Governor’s preventing or obstructing  
future lawsuits by its attorney general. *See id.* Indeed, regardless of the non-party agency’s actions,

1 the state Attorney General would still have its own independent authority to initiate and prosecute  
2 its own lawsuits – there is no “veto” over that power. *Monsanto*, 2023 WL 4083934, at \*3. The  
3 *Amex* Court does not discuss why the Governor or agencies would refuse to comply with party  
4 discovery, when faced with a court order requiring them to do so. Nor does the *Amex* opinion  
5 explain why there would be a “veto” in light of the procedural remedies available to secure  
6 production of documents from the hypothetically refusing state agencies; nor does the opinion  
7 discuss alternative procedures available to obtain discovery from recalcitrant third parties.

8 More fundamentally, the *Amex* Court’s alleged harm from a “virtual veto” is illusory. Even  
9 if state agencies operate independently from their state attorneys general, the *Amex* opinion ignores  
10 the role that state attorneys general have as counsel for the state agencies. As discussed below,  
11 typically a State’s constitutional or statutory scheme mandates that all state agencies utilize their  
12 state Attorney General as legal counsel in litigation (albeit sometimes with allowable exceptions  
13 under certain conditions, none of which have been shown to exist or been triggered in this Multi-  
14 District Litigation). Under such required representation schemes, the state Attorneys General must  
15 still advise, confer, and coordinate with their clients (the respective state agencies) regardless of  
16 whether a discovery request is served pursuant to Rule 34 or Rule 45. The “virtual veto” argument  
17 assumes without explanation that these agencies would refuse to comply with party discovery under  
18 Rule 34, but would at the same time comply with third-party discovery under Rule 45. In other  
19 words, the “virtual veto” argument assumes the agencies would reject party discovery with such  
20 vehemence that they would risk sanctions, but inexplicably would comply normally in response to  
21 subpoenas. While the burdens and procedures between Rule 34 document requests and third-party  
22 subpoenas differ in some respects, as a practical matter, when it comes down to the fundamental  
23 issue of whether documents will be produced, the same general types of discussions between counsel  
24 as to relevance, scope, proportionality, and privilege apply to both. It is not explained why an  
25 agency would absolutely refuse to produce documents at all under Rule 34 without good and proper  
26 reasons, and yet why the same good and proper reasons would disappear in the face of a subpoena.  
27 Further, it is not explained why a Governor or state agency lacks the exact same “virtual veto” if  
28 and when it were to obstinately refuse to produce any documents at all in response to a subpoena –

1 the same unfounded fear that an agency would act so extremely uncooperatively is unbounded and  
2 (under the plaintiffs' hypothetical) would be just as likely to occur in response to a subpoena.

3 Further, these unsubstantiated fears that agencies would refuse to produce documents, even  
4 when coordinating with their own lawyers from their own state Attorney General's office, ignores  
5 the close relationship lawyers have with their clients. Indeed, this argument ignores the likely much  
6 closer relationship that a state agency would have with lawyers from their state's Attorney General's  
7 office, who repeatedly represent their state's agencies in multiple matters throughout the years. This  
8 argument also ignores that this refusal to produce documents sought under Rule 34 would persist  
9 even after these state Attorneys General perform able legal services and reasonably advise their  
10 clients about the obligations to comply with reasonable, proportional discovery under the Federal  
11 Rules (and the enforcement mechanisms available when parties refuse to comply at all). Combined  
12 with the fact that there is no explanation how a refusal to produce documents would necessarily put  
13 the litigation to an end (*i.e.*, veto the litigation), the alleged harm here is based on a hyperbolic,  
14 worst-case scenario argument. Therefore, the notion that Governors or state agencies could  
15 effectively veto an enforcement action by withholding documents sought under Rule 34 is an  
16 unfounded hypothetical and not a strong basis on which to find a lack of control where other factors  
17 support such a finding.

18 As discussed, if the state agencies simply refused to provide documents, the *Amex* opinion  
19 ignores that they *would* be subject to legal consequences. *Lofton, v. Verizon Wireless (VAW) LLC*,  
20 308 F.R.D. 276, 285 (N.D. Cal. 2015) ("The court's inherent authority to sanction includes not only  
21 the authority to sanction a party, but also the authority to sanction the conduct of a nonparty who  
22 participates in abusive litigation practices, or whose actions or omissions cause the parties to incur  
23 additional expenses."). A Court has the inherent authority to enforce its own Orders to control the  
24 conduct of the proceedings, protect the "orderly administration of justice," and maintain "the  
25 authority and dignity of the court." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764–67 (1980).  
26 Should a state agency violate an Order compelling production, this Court would have the inherent  
27 authority to issue sanctions (including monetary sanctions) against the state agencies committing  
28 any such hypothetical refusal to abide by Court Order. The Ninth Circuit has long recognized that,

1 if non-party agencies refuse to produce documents, ultimately the courts may compel them to do so.  
2 *Harvey Aluminum*, 335 F.2d at 754 (“[T]he Departments of Justice and Labor are not sovereign, and  
3 though the [National Labor Relations] Board may not be able to compel them to produce documents  
4 in their possession, the President *or, if need be, the courts, may do so.*”) (emphasis added).

5 The “virtual veto” argument suffers from a further legal weakness: the argument appears to  
6 be based on incorrect views of the legal duties and the role of counsel in the discovery process. As  
7 counsel for a party subject to discovery, a state Attorney General has the legal authority and duty to  
8 take action to make inquiry and collect the documents from the uncooperative state agencies directly  
9 and cannot simply sit on their hands in the face of an uncooperative client. *See, e.g., Rhea v.*  
10 *Washington Dep’t. of Corr.*, 2010 WL 5395009, at \*6 (W.D. Wash. Dec. 27, 2010) (State Attorney  
11 General representing agency: “counsel” “has an obligation to not just request documents of his  
12 client, but to search for sources of information. Counsel must communicate with the client, identify  
13 all sources of relevant information, and ‘become fully familiar with [the] client’s document retention  
14 policies, as well as [the] client’s data retention architecture.’”) (internal citation omitted). “The  
15 relevant rules and case law establish that an attorney has a duty and obligation to have knowledge  
16 of, supervise, or counsel the client’s discovery search, collection, and production. It is clear to the  
17 Court that an attorney cannot abandon his professional and ethical duties imposed by the applicable  
18 rules and case law and permit an interested party or person to ‘self-collect’ discovery without any  
19 attorney advice, supervision, or knowledge of the process utilized.” *Equal Emp. Opportunity*  
20 *Comm’n v. MI 5100 Corp.*, No. 19-CV-81320, 2020 WL 3581372, at \*2–3 (S.D. Fla. July 2, 2020)  
21 (“Attorneys have a duty to oversee their clients’ collection of information and documents, especially  
22 when ESI is involved, during the discovery process. Although clients can certainly be tasked with  
23 searching for, collecting, and producing discovery, it must be accomplished under the advice and  
24 supervision of counsel, or at least with counsel possessing sufficient knowledge of the process  
25 utilized by the client. Parties and clients, who are often lay persons, do not normally have the  
26 knowledge and expertise to understand their discovery obligations, to conduct appropriate searches,  
27 to collect responsive discovery, and then to fully produce it, especially when dealing with ESI,  
28 without counsel’s guiding hand.”).

1 This would not be the first time an attorney was faced with a client who posed difficulties in  
2 collecting documents for discovery. *See, e.g., Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-  
3 B (BLM), 2010 WL 1336937, at \*2–5 (S.D. Cal. April 2, 2010). Counsel in a litigation have legal  
4 duties to take proactive steps in supervising and searching for documents in discovery that go far  
5 beyond simply acceding to a client who fails (or worse, refuses) to produce or provide documents.  
6 *Id.* (detailing “Discovery Errors” by counsel); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2016  
7 WL 5791210, at \*3–4 (N.D. Cal. Oct. 4, 2016) (awarding discovery sanctions where, among other  
8 things, there was “no indication that Safeway’s counsel guided or monitored [client employee] Mr.  
9 Guthrie’s search of the legacy drive in any significant way”).

10 Counsel cannot simply advise clients about document requests and leave it up to the client  
11 to decide whether or not to risk sanctions for failure to produce – in appropriate circumstances,  
12 counsel may need to personally conduct or directly supervise a client’s collection, review, and  
13 production of responsive documents. *See Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, No. 16-  
14 cv-06370-EJD (VKD), 2020 WL 2838806, at \*5–7 (N.D. Cal. June 1, 2020) (awarding discovery  
15 sanctions: “It is not enough for counsel to provide advice and guidance to a client about how to  
16 search for responsive documents, and then not inquire further about whether that advice and  
17 guidance were followed . . . . The Court does not conclude that counsel must always personally  
18 conduct or directly supervise a client’s collection, review, and production of responsive documents.  
19 However, in the circumstances presented here, the Court finds that [counsel] Sheppard Mullin did  
20 not make a reasonable effort to ensure that [sanctioned party] Ningbo Sunny produced all the  
21 documents responsive to Orion’s requests and thus violated its obligations under Rule 26(g)(1)(B) .  
22 . . . [T]he Court orders Ningbo Sunny’s new counsel of record to undertake an independent effort  
23 to ensure that Ningbo Sunny fully complies with Orion’s post-judgment document requests.”); *see*  
24 *also Etopus Tech., Inc. v. Liu*, No. 23-cv-06594-HSG (PHK), 2024 WL 3311053, at \*6 (N.D. Cal.  
25 July 5, 2024) (ordering production of documents and ordering counsel to provide supplemental  
26 response “attesting to the fact that Defendant’s counsel performed the search for documents directly  
27 (and did not rely solely on their client), and attesting to whether Defendant’s counsel themselves  
28 performed a reasonable, good faith search”).

1           The Court finds as legally erroneous the argument that the state Attorneys General would  
2       lack control over state agency materials simply because litigation counsel is either helpless in the  
3       face of an uncooperative client or can satisfy their obligations as officers of the Court by merely  
4       acquiescing to a client’s refusal to collect documents (and presumably allowing a client to face  
5       sanctions). *See Kaur v. Alameida*, No. CV F 05 276 OWW DLB, 2007 WL 1449723, at \*2 (E.D.  
6       Cal. May 15, 2007) (finding defendants have control over agency documents and ordering further  
7       search: “defendants *and counsel* are reminded of their duty under Rule 34 to conduct a diligent  
8       search and reasonable inquiry in effort to obtain responsive documents”) (emphasis added). The  
9       “virtual veto” arguments are based on a fundamentally flawed misunderstanding of counsel’s role  
10      and the available procedures under the Federal Rules for the proper conduct of discovery and the  
11      rational administration of justice – counsel have a proactive duty to conduct discovery under the  
12      rules without requiring constant judicial intervention. “In complex litigation such as this, cases are  
13      shaped, if not won or lost, in the discovery phase. The rules of discovery must necessarily be largely  
14      self-enforcing. The integrity of the discovery process rests on the faithfulness of *parties and counsel*  
15      to the rules—both the spirit and the letter. ‘[T]he discovery provisions of the Federal Rules are  
16      meant to function without the need for constant judicial intervention and . . . those Rules rely on the  
17      honesty and good faith of counsel in dealing with adversaries.’ The rules of procedure (and  
18      attorneys’ duty to adhere to them) apply with equal force to decisions made in private discussions  
19      behind closed doors in a client’s office on how much effort to expend to answer the opposing party’s  
20      discovery, as to attorney conduct in the bright light of open court.” *Poole ex rel. Elliott v. Textron,*  
21      *Inc.*, 192 F.R.D. 494, 507 (D. Md. 2000) (citation omitted) (emphasis added); *see also King v. Habib*  
22      *Bank Ltd.*, No. 20-cv-04322-LGS-OTW, Dkt. 272, slip op. at 2 (S.D.N.Y. July 1, 2024)  
23      (“embroil[ing this judge] in day-to-day supervision of discovery [is] a result directly contrary to the  
24      overall scheme of the federal discovery rules”).

25           In addition to supervising the collection of documents and making inquiry of clients to  
26      ensure proper collection of documents is undertaken, attorneys representing clients in court  
27      proceedings have legal duties under the Federal Rules of Civil Procedure to work cooperatively to  
28      improve the administration of civil justice, both as officers of the court and under their ethical



obligations as members of the bar. *See* Fed. R. Civ. P. 1 advisory committee’s note to 2015 amendment; *see also* Fed. R. Civ. P. 26(g) advisory committee’s note to 1983 amendment (“Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. . . . The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that *obliges each attorney* to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term ‘response’ includes answers to interrogatories and to requests to admit as well as responses to production requests. ***If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.***”) (emphasis added)

These duties imposed on counsel are important for the discovery system under the Federal Rules to operate rationally and effectively. As the Ninth Circuit has recognized, “legal duties” are logical antecedent to “legal rights” and thus the state Attorneys’ General legal duties to undertake proactive efforts to collect documents from clients in discovery are the flip side to the legal right to access those documents. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 790 n.5 (9th Cir. 2002) (“The logical relationship between rights and duties has been the subject of considerable academic examination. Wesley Hohfeld famously described rights and duties as ‘jural correlatives’—different aspects of the same legal relation. Oliver Wendell Holmes described rights as ‘intellectual constructs used to describe the consequences of legal obligations. [sic] As he puts it [in *The Common Law* (1881)], ‘legal duties are logically antecedent to legal rights.’”) (internal citations omitted). Here, the recognition that a state Attorney General, presumptively counsel for its state agencies, has legal duties to supervise the collection of (and possibly directly obtain) documents from those agencies for discovery leads logically to the conclusion that the state Attorneys General have the legal right to access those documents. That is, counsel’s legal duty to ensure collection of documents from a client is a different aspect of (and correlates juridically to) a legal right to access those documents, and thus supports the conclusion of control for purposes of discovery.

Finally, as discussed herein, the issue of control is analyzed on a state-by-state basis. Assuming there is a factual record showing an actual, cognizable, and not an unfounded hypothetical



risk of a “virtual veto” materializing in a particular State, the Court would consider that factor among the totality of circumstances to evaluate the control issue.

# **VI. ATTORNEY-CLIENT RELATIONSHIP AND LEGAL RIGHT TO ACCESS**

As noted, many (if not all) of the state Attorneys General have confirmed that they will (or likely will) represent their respective state agencies. When a state agency is mandated to use the state attorney general as its exclusive legal counsel, this mandate carries with it an indication that the attorney general has legal control over the agency’s documents. The close coordination underlying an attorney-client relationship is a factor in the legal control analysis. “In general, an attorney is presumed to have control over documents in its client’s possession.” *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 2014 WL 1796661, at \*2 (W.D. Tex. May 6, 2014).

In *Love v. New Jersey Dept. of Corr.*, No. 2:15-CV-4404-SDW-SCM, 2017 WL 3477864, at \*5–6 (D.N.J. Aug. 11, 2017), the Court held that the defendants have control over the documents of a third-party state agency “albeit through their attorney” where those defendants were defended by the New Jersey Attorney General, who also represented the third-party agency. *Accord Williams v. Hawn*, No. 1:21-cv-446, 2022 WL 22859198, at \*2 (W.D. Mich. Aug. 26, 2022) (finding defendants have control over third-party agency documents: “Courts have considered the existence of a principal-agent relationship sufficient to satisfy the ‘possession, custody, or control’ requirement . . . . Here, Defendants are represented by the Michigan Attorney General, which has demonstrated access to [third-party agency] MDOC documents and materials in many cases before this Court.”).

In *Synopsys, Inc. v. Ricoh Co.*, No. C-03-2289 MJJ (EMC), 2006 WL 1867529 (N.D. Cal. July 5, 2006), the defendants sought an order compelling Ricoh to search for and produce documents from a third party, KBSC. The Court ordered that search for documents where it was “especially telling” that common counsel was involved:

In making this order, the Court finds that Ricoh has sufficient control over KBSC for purposes of Rule 34 for the Court to order counsel for Ricoh to search the storage facility . . . . Although the Court acknowledges that voluntary cooperation between a party and a third party does not automatically establish control, the facts here suggest that there is more than just voluntary cooperation. It is especially telling that KBSC agreed to be represented by Ricoh’s counsel for

1 purposes of discovery and, more important, that Ricoh was able to  
2 secure a search of the storage facility by Mr. Bershader and a  
3 declaration from the same within only three days of the parties' meet  
4 and confer."

5 *Id.* at \*2. Under *Synopsys*, then, the fact that the party and third party are represented by the  
6 same counsel is "especially telling" and thus a relevant factor in finding legal control. The Court is  
7 cognizant that *Synopsys* cites out-of-circuit case law which refers to the "practical ability" factor  
8 rejected by the Ninth Circuit in *Citric Acid*. *Id.* (citing *Bank of New York v. Meridien BIAO Bank*  
9 *Tanzania Ltd.*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997)). However, in *In re NCAA Student-Athlete*  
10 *Name & Likeness Litig.*, No. 09-cv-01967 CW (NC), 2012 WL 161240, at \*4 (N.D. Cal. Jan. 17,  
11 2012), the Court undertook a "close look at the facts of those two cases" and explained that at least  
12 in part their holdings did not fundamentally rely on the "practical ability" test. The Court held that,  
13 even if the Court were to apply the rejected "practical ability" test, under the facts of the case the  
14 moving party failed to support a finding of "practical ability." *Id.*

15 In the state governance context, a legal relationship between the state Attorney General and  
16 the agency establishes a direct legal link between the agency and the plaintiff (either directly where  
17 the Attorney General is a named plaintiff, or through counsel), thus supporting a finding of control.  
18 *See Bd. of Educ. of Shelby Cnty., Tenn.*, 2012 WL 6003540, at \*3 ("Based upon these statutory  
19 duties to handle 'all legal services,' 'direct and supervise' all litigation, and 'represent' the State of  
20 Tennessee, one such responsibility must be to respond appropriately to discovery requests on behalf  
21 of the entities of the state government that he represents as required by the Federal Rules of Civil  
22 Procedure." ). As the designated legal representative for a state agency, the Attorney General has  
23 professional and ethical obligations to access to all relevant documents to provide effective legal  
24 counsel and representation. This access is *legally mandated* (and goes beyond a mere practicality),  
25 ensuring that the Attorney General can fulfill their duties under the Federal Rules.

26 If a state agency's use of the state Attorney General as legal counsel is not mandatory but  
27 relies on consent of the state agency, the analysis of legal control over the agency's documents may  
28 rely on other factors such as whether, in a given case, the state agency has already committed in fact  
to be so represented, or if there are no conditions for the state agency to avoid relying on the free  
legal services of the state attorney general. While a state agency may be granted by statute some

potential or theoretical ability to choose legal representation, often that ability is subject to the discretion of the state Attorney General or subject to some other restriction (such as a conflict of interest). Further, at hearings in this Multi-District Litigation which involves some states where the state agency may have some ability to be represented by counsel other than the state Attorney General, this Court has inquired of and suggested to the State Attorneys General that they discuss this litigation and confirm whether or not the agencies at issue will rely on their local state Attorney General. *See* Dkt. 818. The Court notes that, to date, no separate counsel has entered appearances for any of the state agencies at issue, and the state Attorneys General previously indicated that they have either chosen not to or (at minimum) simply failed to confer with their state agencies, even as a courtesy. However, a number of State Attorneys General have voluntarily sent litigation hold notices to their respective identified agencies, and pursuant to this Court's Order, the State Attorneys General who did not voluntarily do so have sent litigation hold notices to their respective agencies. [Dkt. 1025]. Despite having notice of this litigation and the fact that they may be the subject of discovery, none of the state agencies at issue have moved to intervene to advance their own alleged interests in not being subject to party discovery. And no state agencies (where they would have the ability to do so under state law) have indicated that they retained private or separate counsel (such as agency counsel) to represent their interests without the benefit of otherwise free legal representation from their State Attorney General. Thus, the current record submitted to this Court for decision indicates that no state agencies have confirmed they will retain separate counsel (as none has entered appearance), and the Court analyzes the issues for the states below with the factual record as the State Attorneys General have chosen to submit.

**VII. A PARTY TO THE SUIT IS BOTH A LEGAL SERVICES PROVIDER WHILE ALSO COUNSEL TO BOTH ITSELF AS A PARTY AND COUNSEL TO THE THIRD PARTY**

As discussed, in nineteen of the state lawsuits here, the state Attorney General is a named party to the suit as relator. Further, in another three lawsuits, the state Attorney General is the sole named plaintiff. *See* Multistate Complaint (naming Attorneys General of Maryland and New Jersey); *see also Office of the Attorney General, State of Florida, Department of Legal Affairs v. Meta Platforms, Inc.*, No. 23-cv-05885, at Dkt.1 (N.D. Cal. Oct. 24, 2023) (Florida complaint

1 naming “Office of the Attorney General, State of Florida” as Plaintiff). Thus, in twenty-two of the  
2 cases in this Multi-District Litigation the Party nominally subject to party discovery as plaintiff is  
3 the state Attorney General itself. In the remaining thirteen state Plaintiff cases in this Multi-District  
4 Litigation, the plaintiff state is represented by the state Attorney General as counsel.

5 As discussed in the state-by-state analysis below, for many (if not most) of the states the  
6 Attorney General is obligated by local law to represent the state agencies at issue in this matter.  
7 Indeed, several of the state Attorneys General have indicated to the Court that they will in fact  
8 represent their state agencies at issue for purposes of discovery in this case. *See* Dkt. 738-1. For  
9 the remainder, the state Attorney General may have some element of statutory discretion not to  
10 necessarily represent the state agencies under certain conditions (such as a conflict of interest) – but  
11 no such conditions have been presented to the Court by any of the state Attorneys General.  
12 Accordingly, the upshot is that, on the current record before the Court, it appears that all (or virtually  
13 all) of the state Attorneys General will represent both the named plaintiff and the state agencies at  
14 issue for purposes of discovery in this case.

15 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement  
16 organization (the Attorney General) is both a party to the case while also acting or able to act as  
17 counsel for a third party. However, law firms and legal services providers are themselves parties to  
18 litigation sometimes. And this case would not be the first time that a legal services provider, as a  
19 party, is found to have control over third party documents for purposes of discovery. *See, e.g.,*  
20 *Becnel v. Salas*, No. MC 17-17965, 2018 WL 691649, at \*4 (E.D. La. Feb. 2, 2018) (“Both Salas  
21 individually and his law firm, the subpoena recipients and defendants in this court, are counsel of  
22 record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production  
23 to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas  
24 and his law firm had possession, custody or control.”).

25 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over  
26 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. Thus, to the extent a state  
27 Attorney General represents a state agency for discovery, that state Attorney General would be  
28 presumed to have control over the documents in its client’s possession.

Precedent explains why courts have found a legal services provider, particularly a state Attorney General, representing both a party and a third party (particularly a state agency) to be properly found to have control of the third party's documents for discovery. First, again as discussed above, control in this context does not mean "operational" or "managerial" control – these precedents are not deciding that a law firm directs the day-to-day operations of their client, and arguments by several of the state Attorneys General that they do not control the state agencies in this "operational" or "executive" sense are not on point. Second, in a reflection that control should be grounded in reality, courts find control in situations involving government attorneys representing both a party and a third-party agency based on their real-world experiences and the facts as a whole. *Int'l Union of Petroleum & Indus. Workers*, 870 F.2d at 1453 ("[c]ontrol must be firmly placed in reality.").

Multiple courts have found that a party (such as a government employee or official) has control over documents of a state agency based in part on the fact that the governmental party was represented by and/or employed by the state Attorney General:

If Defendants seek to avoid production by contending that they are not in possession, custody or control of the requested documents, their objection is denied. The specific facts of this action render such an objection unfounded. By virtue of their employment with non-party CDCR [California Department of Corrections and Rehabilitation], individual defendants are represented by the Attorney General's Office. It is this Court's experience that either individual defendants who are employed by CDCR and/ or the Attorney General can generally obtain documents, such as the ones at issue here, from CDCR by requesting them. They have constructive control over the requested documents, and the documents must be produced.

*Pulliam v. Lozano*, No. 1:07-CV-964-LJO-MJS, 2011 WL 335866, at \*1 (E.D. Cal. Jan. 31, 2011); *see also Quiroga v. Green*, No. 1:11CV00989 AWI DLB, 2013 WL 6086668, at \*2 (E.D. Cal. Nov. 19, 2013) (affirming Magistrate Judge order finding defendant has control over third-party agency documents: "it is this Court's experience that either individual defendants who are employed by CDCR, and/or the Attorney General who represents them, can generally obtain documents from CDCR by requesting them. If this is the case, then, based on their relationship with CDCR, they have constructive control over the requested documents and the documents must be produced."); *accord Mitchell v. Adams*, No. CIVS062321GEBGGHP, 2009 WL 674348, at \*9, 11–13, 17 (E.D.

1 Cal. Mar. 6, 2009) (rejecting multiple objections regarding alleged lack of control of agency  
2 documents where common counsel represented a party and the agency). To the extent these  
3 precedent involve a government official as the party found to have control over agency documents,  
4 these precedents are even more germane to the twenty-four cases here where the state Attorney  
5 General themselves are the specifically named plaintiff or co-plaintiff.

6 Similarly, in *Zackery*, the Court overruled the objection that the named individual defendants  
7 lacked control over the documents of a third-party agency. *Zackery v. Stockton Police Dep't.*, No.  
8 CIVS-05-2315MCEDADP, 2007 WL 1655634, at \*4 (E.D. Cal. June 7, 2007). The *Zackery* Court  
9 ordered that discovery be provided to the plaintiff directly by the government counsel involved (who  
10 both represented the named defendants and the agency): “the court will direct **counsel for**  
11 **defendants** [Office of the City Attorney] to make the necessary inquiries and arrangements for the  
12 requested citizen complaint records to be produced to plaintiff.” *Id.* (emphasis added).

13 These cases are illustrative of factual situations involving the same prosecuting attorneys  
14 (such as a state Attorney General) representing both a named party and the third party agency, and  
15 demonstrate that courts conclude there is control such that the agency documents were subject to  
16 party discovery. This factor of “common counsel” and its impact on a finding of control extends  
17 beyond the governmental entity context, thus demonstrating that this factor is recognized and  
18 applied by courts in a broader context. *See, e.g., Almont Ambulatory Surgery Center, LLC*, 2018  
19 WL 1157752, at \*19 (finding control where, among “[o]ther factors that courts consider to  
20 ‘determine when documents in the possession of one corporation may be deemed under control of  
21 another corporation,’ . . . Additional factors include: employing the same attorneys”) (citations  
22 omitted); *see also M.L.C., Inc. v. N. Am. Philips Corp.*, 109 F.R.D. 134, 139 (S.D.N.Y. 1986)  
23 (finding control where “[i]n fact, it appears that Mr. Hainline [(counsel for the third parties)] and  
24 defendants’ present counsel have a working relationship.”).

25 To be clear, the Court is not relying on these precedents to demonstrate the practical ability  
26 of the state Attorney General to obtain documents from the state agencies. Rather these precedents  
27 demonstrate that, under the totality of circumstances, control can be found where the decision is  
28 firmly placed in reality. These precedents also demonstrate that the hypothetical fear of agency



refusals to cooperate with party discovery has not materialized.

Finally, the Court is not holding broadly that the law requires finding a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party. However, this factor is one of the totality of factors which impact the control inquiry and here, because the state Attorneys General are either parties themselves or at least are counsel for a party, and because the state Attorneys General will represent the state agencies for discovery, this factor takes on particular significance.

#### **VIII. STATUTORY RESTRICTIONS ON A STATE ATTORNEY GENERAL FROM ACCESSING DOCUMENTS FROM THE STATE'S AGENCIES**

Several state Attorneys General have argued that local statutes place limitations on their ability to access documents from a state agency. These are discussed in detail in the state-by-state analysis below. As a preliminary matter, not all of these statutes actually place limits on the state Attorneys General as argued. Some are limited to only a specific subset of agencies (some of which are not even relevant to this matter). And detailed analysis shows that some actually provide a mechanism and a right to access agency documents, not prohibit access.

As a variation of this argument, some of the state Attorneys General argue that public channels or public information requests are required for the state Attorney General to obtain documents from state agencies. This argument is based on an interpretation of the various “open records” statutes which the Court finds legally erroneous. None of the cited “public records” statutes state that they are the exclusive method by which a state Attorney General can access documents from state agencies. Further, the state Attorneys General argue perhaps too much in this regard – if their arguments are taken literally, then these “open records” statutes would constitute a legal right to access the agencies’ documents on the part of the corresponding state Attorney General. By definition, an “open records” statute provides a mechanism by which a state Attorney General can literally obtain requested documents upon demand from an agency. If the state Attorneys General were correct that, every time a lawyer of the state Attorney General seeks documents from state agencies, a public records law requests would be routine and necessary, then the logical conclusion is that the public records law would be a routinely used legal right to access those documents and

1 records of the agency subject to the Act. At least one court has found that a state “public records”  
2 Freedom of Information Act constitutes a legal right to access documents from an agency for  
3 purposes of “control” under Rule 34. *See Flagg v. City of Detroit*, 252 F.R.D. 346, 355–57 (E.D.  
4 Mich. 2008) (“Because at least some of the text messages maintained by [(third party)] SkyTel are  
5 ‘public records’ within the meaning of Michigan’s FOIA, it would be problematic, to say the least,  
6 to conclude that the [named defendant] City lacks a legal right to obtain these records as necessary  
7 to discharge its statutory duty of disclosure.”). However, the Court finds that the arguments based  
8 on these “open records” statutes to be incorrect, in any event.

9 The “open records” arguments are particularly weak in the situation where a state Attorney  
10 General is required to act as counsel for the state agencies by local mandate. If this interpretation  
11 of the “open records” statutes were correct, then the state Attorneys General would have to submit  
12 an “open record” request or “public information” request even when representing a state agency, to  
13 get documents from its own client. In fact, under the argument presented, any lawyer representing  
14 any state agency (whether the state Attorney General or private counsel) would be forced to use an  
15 “open records” request to obtain documents from their own client. Such an interpretation is  
16 nonsensical and impractical, as well as contrary to the principles of effective legal representation.  
17 As counsel, a state Attorney General will have the normal type of direct access to the necessary  
18 documents from its own clients, ensuring efficient and comprehensive legal support for the agencies  
19 involved. The Attorneys General’s role as legal counsel for state agencies (with concomitant ethical  
20 and professional obligations) directly contradicts the argument that they would be entirely restricted  
21 from accessing their clients’ documents. In their capacity as counsel, Attorneys General are often  
22 responsible for representing the interests of state agencies, which would include responding to  
23 subpoenas and managing legal matters on their behalf. This representative role inherently requires  
24 a level of access to agency documents necessary to fulfill their duties effectively. The state  
25 Attorneys General cite no precedent requiring any attorneys representing a state agency to use either  
26 an “open records” request or a subpoena to obtain documents from their own clients. The cited  
27 “public records” or “open information” statutes are not shown to be actual impediments to normal  
28 attorney-client access to documents, because those statutes apply to records which are to be

produced for public inspection (and not for purposes of litigation such as this Multi-District Litigation), particularly where there is a Protective Order limiting public availability of confidential documents.

While other statutes discussed below may be factors in the legal control analysis, such statutes are only one among the totality of factors for deciding control and the discussion above regarding the impact (or lack thereof) of state statutes on this issue is of equal force.

# **IX. THIRD PARTY INVOLVEMENT IN THE LITIGATION AND WHETHER THE THIRD PARTY STANDS TO BENEFIT FROM THE LITIGATION**

In the context of corporate disputes, courts have found legal control when a party and non-party have similar financial interests. In *Hitachi*, Defendant AmTRAN argued that Plaintiff and patent owner Hitachi had legal control over documents from Hitachi’s patent licensing agent Inpro II Licensing Sarl (Inpro), and accordingly that Hitachi should obtain and produce documents from Inpro in response to AmTRAN’s Rule 34 document requests. *Hitachi*, 2006 WL 1038248, at \*1. The *Hitachi* opinion noted that “a subsidiary will be required to produce documents wholly owned by the parent company. The third party’s financial interest in the litigation might further require its cooperation in the discovery process.” *Id.* (citations omitted).

In the context of state governance, this principle applies where state Attorneys General and the state agencies would benefit from a damage award resulting from the litigation brought by the state Attorney General. Just as courts have found legal control in corporate settings when a party and non-party have similar financial interests, a similar rationale applies to state entities. *Id.* If a state agency stands to gain financially from the litigation outcome, its interests align closely with those of the Attorney General. *Cf. Japan Halon*, 155 F.R.D. at 628–29 (“This court does not agree that because neither parent corporation owns a majority of the shares, neither will benefit. The court is also not convinced that because any award would go to Japan Halon, its parent corporations would not benefit directly enough to warrant any production of documents on their behalf.”). When litigation proceeds directly support or fund a state agency, it is reasonable to expect full cooperation in the discovery process. This cooperation ensures the availability of relevant documents, enhancing the attorney general’s enforcement actions and promoting justice. Here, all the States have expressly

1 stated that “[t]his action is in the public interest of the Filing States” and thus have made clear they  
2 have a substantial stake in the outcome of this action going even beyond financial interests. *See*  
3 Multistate Complaint at ¶ 12.

#### 4 **X. OTHER RELEVANT FACTORS**

5 As discussed above, the Ninth Circuit rejected the “practical ability” as the test for legal  
6 control in *Citric Acid*. *See Genentech, Inc. v. Trustees of Univ. of Pennsylvania*, No. C 10-2037  
7 PSG, 2011 WL 5373759, at \*2 (N.D. Cal. Nov. 7, 2011) (distinguishing *Hitachi*’s citation to  
8 “practical ability” case law); *see also In re NCAA Student-Athlete Name & Likeness Litig.*, 2012  
9 WL 161240, at \*4. The Court notes that one district court in this Circuit has carefully analyzed  
10 *Citric Acid* and found that the Ninth Circuit cited favorably therein to a Third Circuit opinion which  
11 holds that “practical ability” is a factor for the “legal control” test. *AFL Telecomms. LLC v.*  
12 *SurplusEQ.com Inc.*, No. CV11-1086 PHX DGC, 2012 WL 2590557, at \*2 (D. Az. July 5, 2012)  
13 (citing *Gerling Int’l Ins. Co. v. Comm’r*, 839 F.2d 131, 140–41 (3rd Cir. 1988)). Precedents in this  
14 district have, however, distinguished *AFL Telecommunications*. *See Seifi v. Mercedes-Benz U.S.A.,*  
15 *LLC*, No. 12-CV-05493TEH (JSC), 2014 WL 7187111, at \*2 (N.D. Cal. Dec. 16, 2014); *cf. also*  
16 *Dugan v. Lloyds TSB Bank, PLC*, No. 12CV02549WHANJV, 2013 WL 4758055, at \*2 (N.D. Cal.  
17 Sept. 4, 2013).

18 As noted, the issue in *Citric Acid* arose in the context of a motion to enforce a subpoena  
19 directed to a third party, in which the moving party was seeking discovery from a fourth party via  
20 that third party. *Citric Acid*, 191 F.3d at 1106–07. That is, in *Citric Acid* the subpoenaed third party  
21 was alleged to control a further uninvolved fourth party. *Id.*

22 District court opinions have noted that *Citric Acid* dealt with a subpoena, and those opinions  
23 have assumed that the standard and scope of “legal control” for purposes of a subpoena is the same  
24 as the standard for evaluating the scope of “legal control” for purposes of a document request to a  
25 party under Fed. R. Civ. P. 34. *See, e.g., Soto*, 162 F.R.D. 603; *Hitachi*, 2006 WL 2038248; *In re*  
26 *Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. 167; *Perez*, 2011 WL 1362086; *Miniace*, 2006 WL 335389.  
27 However, it appears that no Ninth Circuit case has specifically addressed whether the scope and  
28 standard for evaluating “legal control” under Rule 34 is the same with regard to a subpoena under

1 Rule 45 (which was at issue in *Citric Acid*). As noted, other Circuits have expressly held that  
2 “practical ability” is a factor for the legal control test in the context of document requests under Rule  
3 34. *Gerling Int’l Ins. Co.*, 839 F.2d at 140–41.

4 As the Ninth Circuit has stated, “[w]e begin with the principle that the district court is  
5 charged with effectuating the speedy and orderly administration of justice. There is universal  
6 acceptance in the federal courts that, in carrying out this mandate, a district court has the authority  
7 to enter pretrial case management and discovery orders designed to ensure that the relevant issues  
8 to be tried are identified, that the parties have an opportunity to engage in appropriate discovery and  
9 that the parties are adequately and timely prepared so that the trial can proceed efficiently and  
10 intelligibly.” *United States v. W.R. Grace*, 526 F.2d 499, 508–09 (9th Cir. 2008). Further, district  
11 courts have wide discretion in controlling and managing the discovery process. *Little v. City of*  
12 *Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). Indeed, “Rule 26 vests the trial judge with broad  
13 discretion to tailor discovery narrowly and to dictate the sequence of discovery.” *Crawford-El v.*  
14 *Britton*, 523 U.S. 574, 598 (1998). As examples, “upon motion[,] the court may limit the time,  
15 place, and manner of discovery, or even bar discovery altogether on certain subjects, as required ‘to  
16 protect a party or person from annoyance, embarrassment, oppression, or undue burden or  
17 expense.’” *Id.* (quoting Fed. R. Civ. P. 26(c)). “And[,] the court may also set the timing and  
18 sequence of discovery.” *Crawford-El*, 523 U.S. at 598.

19 Here, the complexity of the multidistrict litigation creates a compounding impact on  
20 streamlining discovery. Courts should also consider the goals of efficiency, preservation of judicial  
21 resources, preservation of party resources, and simplification of an already complex discovery  
22 landscape. Courts should consider the manner and process for pretrial discovery in order to reduce  
23 the expense, number of disparate disputes, and procedural complexity. Document requests directed  
24 to one party are, in this Court’s experience, typically more efficient and streamlined than multiple  
25 separate subpoenas each directed to non-parties.

26 In the context of a state in which the statutory scheme mandates the Attorney General to  
27 represent a state agency in litigation, a state Attorney General *will* represent those state agencies in  
28 responding to the discovery here, regardless of whether the documents are sought by Rule 34

1 requests for production or by Rule 45 subpoenas. It would be wasteful to require a party in a  
2 complex litigation to serve individual subpoenas on a multitude of state agencies, particularly where  
3 all parties and this Court know that the Attorneys General *will be* representing those state agencies  
4 in responding to the subpoenas. It is not firmly grounded in reality, and thus elevates form over  
5 substance, to ignore that, at the end of the day, many if not all of the parties will be litigating and  
6 negotiating for the documents sought with the very same legal services providers.

7 Several state Attorneys General have argued that, for analytical purposes, the Court should  
8 subdivide their offices between the team or division of attorneys litigating this Multi-District  
9 Litigation versus other sections or divisions of that particular state Attorney General, in order to  
10 argue that there should not be any consequences flowing from the state Attorneys General  
11 representing both the plaintiff and the state agencies. Such argument is not supported by citation to  
12 law and is contrary to the weight of law. The scope of an attorney-client relationship (and the duties  
13 flowing therefrom) encompasses the entirety of a legal services organization due to well-known  
14 rules of imputation of confidences to a legal services organization, including a public law office:

15 When an attorney associates with a law firm, the principle of loyalty  
16 to the client extends beyond the individual attorney and applies with  
17 equal force to the other attorneys practicing in the firm. This principle,  
18 known as the “rule of imputed disqualification,” . . . requires  
19 disqualification of all members of a law firm when any one of them  
20 practicing alone would be disqualified because of a conflict of interest  
21 . . . . The rule of imputed disqualification applies to both private firms  
22 and public law firms such as a district attorney’s office or the office  
23 of the state public defender.

24 *People ex rel. Peters v. Dist. Ct. In & For Cnty. of Arapahoe*, 951 P.2d 926, 930 (Colo. 1998);  
25 *accord City of Cnty. of Denver v. Cnty. Ct. of City & Cnty. of Denver*, 37 P.3d 453, 457 (Colo. App.  
26 2001); *see also Kirk v. First Am. Title Ins. Co.*, 108 Cal. Rptr. 3d 620, 637–38, 642 (Cal. Ct. App.  
27 2010), *as modified* (May 6, 2010) (recognizing rebuttable presumption of imputed knowledge in the  
28 context of government attorneys). Some jurisdictions treat public legal service organizations like  
private law firms in the context of the scope of the attorney-client relationship. Even in jurisdictions  
which do not automatically impute shared confidences from an attorney-client relationship to an  
entire public law office, those courts recognize that ethical screening or other procedures are  
required. At a general level, the law does not support the blanket argument that different individual



1 lawyers in the Attorney General’s office have separate, discrete attorney-client relationships with  
2 their clients.

3 In this multidistrict litigation, this Court has convened monthly Discovery Management  
4 Conferences in order to provide regular and detailed guidance on the complex discovery process  
5 and discovery disputes. As fact discovery has progressed, the Court has been presented with  
6 numerous discovery motions necessitating separate, hours-long hearings on such disputes.  
7 Managing and controlling state agency discovery as set forth herein is, in one way, intended to help  
8 facilitate management of the overall discovery process in this multidistrict litigation. Resolution of  
9 this “control” issue is directly related to proper and rational management of discovery.

10 This is not merely a hypothetical concern about managing discovery. If the state Attorneys  
11 General were correct as to the absolute lack of control of any of the agencies at issue, then Meta  
12 would be required to issue over 250 individual subpoenas, and then negotiate the scope of each  
13 subpoena after receiving written responses and objections to each. The state agencies and their  
14 counsel would be required to correspondingly respond and object to all of these subpoenas and  
15 negotiate them with Meta. As a result, there would be the potential for these parties to present over  
16 200 allegedly separate disputes over these subpoenas to this Court, with the potential for raising  
17 inconsistent or contradictory arguments. This is not merely a hypothetical concern. The Fourth  
18 Circuit was confronted with precisely this situation. *In re S.C. Dep’t of Parks, Recreation &*  
19 *Tourism*, 103 F.4th 287, 289 (4th Cir. 2024). In that case, a group of multiple States sued Google  
20 for alleged antitrust violations, among them South Carolina. *Id.* Google then served party  
21 discovery, including document requests on the State Attorneys General who objected to the  
22 discovery requests to the extent they sought state agency documents, and the Attorneys General  
23 argued (as here) that Google should serve subpoenas on the state agencies. *Id.* Indeed, the State  
24 Attorneys General (including South Carolina) wrote that “Google issued Federal Rule 45 subpoenas  
25 to numerous state agencies, and State Plaintiffs believe that these subpoenas are the proper channels  
26 for Google to seek documents that are in the possession, custody, or control of those agencies.” *Id.*  
27 Instead of litigating the “control” issue in that case, Google opted instead to voluntarily serve  
28 subpoenas on the state agencies. *Id.* Despite the statements by the South Carolina Attorney General

1 about the propriety of the subpoena process, the South Carolina Department of Parks, Recreation  
2 and Tourism (“SCPRT”) disagreed with the statements of the South Carolina Attorney General and  
3 moved to quash Google’s subpoena entirely based on Eleventh Amendment immunity arguments.  
4 *Id.* at 289–90. In arguments highly reminiscent of the arguments about “control” asserted in this  
5 action, “[a]ccording to SCPRT, because the attorney general ‘does not represent SCPRT or have  
6 custody, possession, or control over its records,’ and because he ‘did not bring his claims against  
7 Google in a sovereign capacity,’ his joining the State to the litigation against Google could not have  
8 waived the Eleventh Amendment immunity of SCPRT, which is a ‘statutorily and constitutionally  
9 separate’ state agency.” *Id.* at 291. The district court denied SCPRT’s motion to quash. On appeal,  
10 the Fourth Circuit affirmed and rejected South Carolina’s arguments which emphasized the  
11 “separateness” of the agency from the State and emphasized the argument that the Attorney General  
12 “does not represent” the agency and does not “have custody or control of its records.” *Id.* at 293.  
13 While *In re South Carolina Department of Parks, Recreation & Tourism* ultimately dealt with  
14 waiver of Eleventh Amendment immunity by a state Attorney General extending to all agencies of  
15 the state, the teachings for the analogous situation here is self-evident: requiring a party (like Google  
16 in that case, or Meta here) to serve subpoenas on different state agencies who could then assert  
17 different (even contradictory) arguments against the subpoenas, where there is a demonstrable and  
18 legal basis for finding control, is not conducive to the just and efficient administration of justice.

19 To the extent the Court find “control” under Rule 34 standards and finds some state agencies  
20 are subject to party discovery, their documents would be sought by document requests directed just  
21 to one party in each state. While there are real-world implications for management of discovery  
22 that flow from the Court’s resolution of this control issue, to be clear the Court has analyzed the  
23 issues under appropriate legal standards discussed herein, but also cognizant of the broad discretion  
24 the Court exercises in ordering the sequence and management of discovery consistent with the  
25 Federal Rules.

26 Accordingly, the Court exercises its authority in finding the conclusions as to control for  
27 each state below pursuant to appropriate legal standards and under the totality of circumstances,  
28 firmly grounding its decision in reality and underpinned by the Court’s full discretion.

## DISCUSSION

As an initial matter, the Court notes that this discovery dispute solely concerns whether the State Attorneys General’s offices have legally sufficient control such that, in responding to Meta’s discovery requests, the state agencies’ documents should be obtained and produced by the State Attorneys General in response to Fed. R. Civ. P. 34 document requests. For the purposes of this dispute, the Parties do not dispute that the State Attorneys General lack possession or custody of the documents from the state agencies – the only issue presented is the issue of control. Indeed, the law would be clear that the State Attorneys General would have the obligation to respond to the discovery requests if they did have possession or custody of the documents. To the extent the Parties frame their arguments or this dispute as to whether the agencies should be treated as “parties” for this multidistrict litigation such arguments are, at best, imprecise. Whether a party needs to or is requested to be joined as a named party to this case under Fed. R. Civ. P. 19 or 20 are issues, of course, beyond the scope of the discovery referral order in this action.

Thus, the issue at hand is the specific question: whether the State Attorneys General have legal control, for the purposes of discovery, over their respective state agencies under relevant legal standards. It is self-evident from the length of this opinion that state Attorneys General and Meta raised complex questions in the context of the factors used to determine control under the “legal control” test. In light of (and incorporating by reference) this discussion of the legal standards, the Court next analyzes the control issue on a state-by-state basis. The Court approaches that state-by-state analysis following the directive that, fundamentally, “[c]ontrol must be firmly placed in reality.” *Int’l Union of Petroleum & Indus. Workers*, 870 F.2d at 1453.

### I. ARIZONA

In opposition to the control issue, the Arizona Attorney General argues primarily the following factors: (1) Arizona agencies may respond without the Arizona Attorney General’s assistance; (2) the Arizona Attorney General’s powers arise from statute and are thus not plenary; and (3) the Arizona Attorney General is a separate entity and independent from the Arizona agencies. [Dkt. 738-2 at 2]

In support of a finding of control with regard to these state agencies’ documents, Meta argues

1 based primarily on the following factors: (1) the Arizona Attorney General is the chief legal advisor  
2 for the State; and (2) certain Arizona agencies are proscriptively barred from obtaining counsel other  
3 than the Arizona Attorney General. *Id.* at 3. Here, Meta seeks discovery from the following Arizona  
4 Agencies: Board of Regents, Commerce Authority, Department of Child Safety; Department of  
5 Education; Department of Health Services; Governor’s Office; Governor’s Office of Strategic  
6 Planning and Budgeting; Office of Economic Opportunity; and State Board of Education. *Id.* All  
7 but three of these state agencies are prohibited from employing legal counsel (or making  
8 expenditures for legal services) outside the Arizona Attorney General’s office. Ariz. Rev. Stat. §§  
9 41-192(A), -192(D).

10 After considering the Parties’ briefs, oral argument and other material submitted, and  
11 applying appropriate legal standards discussed herein, the Court finds that the factors weigh in favor  
12 of a finding that the Arizona Attorney General does have legal control, for purposes of discovery,  
13 over most of the Arizona agencies at issue. While the Arizona Attorney General asserts that Arizona  
14 agencies might respond without its assistance and that the Arizona Attorney General’s powers arise  
15 from (and thus are somehow limited by) statute, these arguments do not negate the fact that the  
16 Attorney General is the chief legal advisor for the state government. Ariz. Rev. Stat. § 41-192(A).  
17 The statutory scheme in Arizona requires that “[t]he attorney general **shall**: 1. Be the legal advisor  
18 of the departments of this state and render such legal services as the departments require . . . . [A]nd  
19 coordinate the legal services required by other departments of this state or other state agencies.”  
20 Ariz. Rev. Stat. § 41-192(A)(1)–(3) (emphasis added).

21 Importantly, the Arizona Attorney General’s arguments do not negate the fact that all but  
22 three of the Arizona agencies at issue here are barred by Arizona law from obtaining counsel other  
23 than the Attorney General. Ariz. Rev. Stat. § 41-192(D). Indeed, the Arizona Attorney General  
24 previously confirmed that its office would definitely represent at least four of the Arizona agencies  
25 at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 3–4].  
26 And in their more recent brief, the Arizona Attorney General conceded that they will represent five  
27 state agencies at issue. Dkt. 738-2 at 2 (referring “to the five [agencies] that the [Arizona Attorney  
28 General] currently will, at the request of the agency, represent”). The Arizona statute is clear on its

face that six of the agencies at issue are prohibited completely from retaining separate counsel. *See* Ariz. Rev. Stat. § 41-192(D). While the Arizona Attorney General indicated to the Court that the Attorney General would not represent the Arizona Department of Education and the Arizona Governor’s Office of Strategic Planning and Budgeting, that is an error of law because neither of these agencies are exempt from the express statutory prohibition on retaining different counsel. *See* Ariz. Rev. Stat. § 41-192(D). And to be clear, despite its name, the Arizona Governor’s Office of Strategic Planning and Budgeting is an agency outside the Arizona Governor’s office, has duties to advise both the Governor and Legislature, and is statutorily situated within the Act defining the Arizona Department of Administration. *See* Ariz. Rev. Stat. at §§ 41-701, -722 to -723. Further, as noted above, the Arizona Attorney General has apparently not conferred with these agencies and no other counsel has entered appearance to date for these agencies. Because the Arizona statute is clear on its face that six agencies are barred from retaining separate counsel, *see* Ariz. Rev. Stat. § 41-192(D), the Court finds, based on the current record, that the Arizona Attorney General will serve as counsel in this matter for six agencies (Department of Child Safety; Department of Education; Department of Health Services; Governor’s Office of Strategic Planning and Budgeting; Office of Economic Opportunity; and State Board of Education).

As to the three other state agencies (the Commerce Authority, Board of Regents, and Governor’s office), the Arizona statutory scheme allows those other agencies to retain separate counsel apart from the state Attorney General. *see* Ariz. Rev. Stat. §§ 41-192(D)(4), (7), and (10). The Arizona Attorney General has represented to the Court that these three agencies will not be represented by the Attorney General for purposes of discovery in this matter, should subpoenas be served on these three agencies. [Dkt. 738-1 at 3–4].

Accordingly, it appears that under the statutory scheme six agencies will be represented by the Arizona Attorney General in this matter for discovery. *See* Ariz. Rev. Stat. §§ 41-192(A), -192(D). Thus, because the Arizona Attorney General will be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery, the Court in its discretion determines that a finding of control as to these six agencies is further supported by the simple and pragmatic realities involved in these circumstances.

Further, the Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Arizona Department of Child Safety, the Arizona Department of Education, and the Arizona Department of Health Services. [Dkt. 1031-5 at 734–859]. None of these state agencies are allowed to employ legal counsel other than the Arizona Attorney General and thus by statute each must be represented by the Arizona Attorney General in this matter for discovery. *See* Ariz. Rev. Stat. §§ 41-192(D) (“no state agency other than the attorney general shall employ legal counsel or make an expenditure or incur an indebtedness for legal services, but the following are exempt from this section[,]” listing state agencies other than the three at issue). This arrangement indicates strongly that the Attorney General, in fulfilling its role as Chief Legal Advisor, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies. Therefore, these subpoenas, and the statutory scheme in Arizona regarding how the Attorney General will respond to them, further support the Court’s conclusion that the Arizona Attorney General has legal control, for the purposes of discovery, over at least these the three agencies recently listed in the intent to issue subpoenas.

Relatedly, the Arizona Attorney General has taken the position that communications between the Arizona Attorney General and these state agencies would be covered by the attorney-client privilege if such communications are encompassed within the scope of discovery sought by Meta. [Dkt. 738-2 at 2]. To the extent the Arizona Attorney General has attempted to subdivide its own office between the team litigating this case and other “agency counsel sections” of the state Attorney General, that argument is incorrect. The Arizona Attorney General proffers this argument to limit the attorney-client privilege (and hence the attorney-client relationship) only as to some parts of the state Attorney General’s office but not other sub-teams, without citation to any legal support for that proposition. The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office as discussed above. *See, e.g., People ex rel.*



*Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office or the office of the state public defender.”); accord *City of Cnty. of Denver*, 37 P.3d at 457; see also *Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); cf. also *Billings v. State*, 441 S.E.2d 262, 266 (Ga. 1994) (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); cf. also *Calhoun v. Area Agency on Aging of Se. Arkansas*, 618 S.W.3d 137, 137 (Ark. 2021) (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”).

Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required to avoid either imputed or actual sharing of confidences to avoid a finding of dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that no courts support the Arizona Attorney General’s argument that different individual lawyers in the Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Arizona Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client relationship as between the “team” of attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the Arizona Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these

1 legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue  
2 that on one hand the [State] Attorney General represents these individuals, but that for discovery  
3 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,  
4 2014 WL 1796661, at \*2. The fact that the Arizona Attorney General is attempting to preserve the  
5 ability to assert the attorney-client privilege between the Arizona Attorney General’s office and the  
6 agencies at issue further supports the conclusion of control here. Assertion of the attorney-client  
7 privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See United*  
8 *States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

9 Further, there is no statutory, legal, or administrative rule cited which prohibits the Arizona  
10 Attorney General from accessing the documents of the state agencies at issue. To the extent the  
11 Arizona Attorney General relies on the statutory origins of that office, such state statutes are  
12 unavailing to prohibit a finding of control here. Analogously, in *Osborn*, the Arizona federal  
13 Magistrate Judge overruled objections and ordered individual defendants (officials of the Arizona  
14 Department of Corrections) to produce personnel documents from the files of the state agency,  
15 despite arguments that state statutory restrictions forbade the production of the documents. *Osborn*  
16 *v. Bartos*, 2010 WL 3809847 at \*15 (D. Ariz. Sept. 20, 2010). The *Osborn* court rejected the  
17 arguments of the Arizona Attorney General (representing the defendants in that case) that an under  
18 an Arizona statute “they are without authority to produce the records” and that Arizona regulations  
19 “make personnel files confidential.” *Id.* The Court ordered the defendants in *Osborn* “to produce,  
20 from **whatever personnel or similar file** specifically related to the designated officer, **where such**  
21 **records are normally maintained**, the performance appraisals and disciplinary records in Request  
22 4 as to the named Defendants[.]” *Id.* at \*16 (emphasis added).

23 Further, the Arizona Attorney General does not cite any statutory or legal prohibition on the  
24 Arizona Attorney General’s representing the state agencies in this matter for purposes of discovery.  
25 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement  
26 organization, the attorney general, is both a party to the case while also acting or able to act as  
27 counsel for a third party. However, this would not be the first time that a legal services provider, as  
28 counsel for a party, is found to have control over third party documents for purposes of discovery.

1     *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena  
2     recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida  
3     lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas  
4     to respond as to responsive materials over which Salas and his law firm had possession, custody or  
5     control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control  
6     over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not  
7     holding broadly that there must be a finding of a legal right of access to and thus control over third  
8     party client documents in every case involving a legal services provider as a party; rather, under the  
9     particular facts here, and under the totality of circumstances viewed in light of applicable legal  
10    standards, the Court finds that control exists as to the six agencies represented by the Arizona  
11    Attorney General.

12         Indeed, at least one other federal court has previously found that the Arizona Attorney  
13    General has legal control over Arizona state agency materials. *Generic Pharmaceuticals (II)*, 699  
14    F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with  
15    the applicable legal standards discussed above and in light of the facts and circumstances presented  
16    here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly  
17    consistent with, and to that extent further persuasively supports, the conclusion here with regard to  
18    the Arizona Attorney General’s having control with regard to documents of the state agencies at  
19    issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the  
20    objecting states including Arizona and given the Arizona Attorney General’s office’s experience in  
21    litigating and losing an analogous issue as to authorization to produce documents from agency files  
22    in *Osborn*, this Court is disappointed that the Arizona Attorney General and Meta were unable to  
23    reach a negotiated resolution of this dispute, which other states were able to do in *Generic*  
24    *Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery  
25    Management Conferences, they should make every effort to work out discovery disputes through  
26    reasonable, good faith negotiations between able and experienced counsel, particularly where, as  
27    here, there is guidance in precedent on the discovery issue at hand.

28         Accordingly, in view of the legal standards and the record viewed in the totality of

1 circumstances, the Court finds that the Arizona Attorney General has control, for the purposes of  
2 discovery, over the documents of six of the Arizona agencies at issue, listed above. The Court notes  
3 that the Court credits the Arizona Attorney General's offices representation to this Court that the  
4 Board of Regents, Commerce Authority, and Governor's office will not be represented by any  
5 attorney within the Arizona Attorney General's office for purposes of this case. Should that  
6 representation turn out to be in error or shown to be false, the Court will reconsider its findings as  
7 to control with regard to those three agencies upon proper motion.

## 8 **II. CALIFORNIA**

9 In opposition to the control issue, the California Attorney General argues primarily the  
10 following factors: (1) the California Attorney General is a separate entity and independent from the  
11 California agencies; (2) California agencies are statutorily responsible for maintaining their own  
12 records; and (3) if found to be subject to control for purposes of discovery, the California agencies  
13 would thereby be granted a "virtual veto" over the California Attorney General's independent  
14 responsibilities to bring enforcement actions. [Dkt. 738-3 at 2].

15 In support of a finding of control with regard to these state agencies' documents, Meta argues  
16 based primarily on the following factors: (1) California law sets forth a preference for the California  
17 Attorney General to be employed as the attorney of all legal matters in which California has an  
18 interest; (2) the California Attorney General is presumptively the legal representative of all  
19 California agencies in any judicial proceedings unless specifically exempted; and (3) California  
20 agencies, with limited exception, are proscriptively barred from obtaining counsel other than the  
21 California Attorney General, without consent from the California Attorney General. *Id.* at 3. Here,  
22 Meta seeks discovery from the following California Agencies: Business, Consumer Services, and  
23 Housing Agency; Department of Child Support Services; Department of Consumer Affairs;  
24 Department of Education, Department of Finance; Department of Health Care Services; Department  
25 of Public Health; Office of the Governor; Governor's Office of Business and Economic  
26 Development; Health and Human Services Agency; Mental Health Services Oversight and  
27 Accountability Commission; Office of Data and Innovation; and School Finance Authority. *Id.*

28 After considering the Parties' briefs, oral argument and other material submitted, and

1 applying appropriate legal standards discussed herein, the Court finds that the factors weigh in favor  
2 of a finding that the California Attorney General does have legal control, for purposes of discovery,  
3 over the California agencies in dispute. While the California Attorney General is a separate entity  
4 and while the California agencies maintain their own records, this does not outweigh the requirement  
5 that the California Attorney General is statutorily required to act as the California agencies' counsel,  
6 with limited exceptions which are not shown to be applicable here. *See* Cal. Govt. Code § 11040(a).

7 The California Legislature made clear that the California statutory scheme prefers the  
8 California Attorney General represent state agencies: "It is the intent of the [California] Legislature  
9 that overall efficiency and economy in state government be enhanced by employment of the  
10 Attorney General as counsel for the representation of state agencies and employees in judicial and  
11 administrative adjudicative proceedings." Cal. Govt. Code § 11040(a). The statutory scheme in  
12 California presumes that the California Attorney General will represent state agencies in judicial  
13 actions (even to the exclusion of that agency's own counsel) absent written consent: "Except with  
14 respect to employment by the state . . . agencies specified by . . . name in Section 11041 or when  
15 specifically waived by statute other than Section 11041, a state agency ***shall obtain the written***  
16 ***consent of the Attorney General*** before doing either of the following: (1) Employing in-house  
17 counsel to represent a state agency or employee in any judicial or administrative adjudicative  
18 proceeding. (2) Contracting with outside counsel." *Id.* at § 11040(c) (emphasis added).

19 Further, the California Legislature has made clear "that it is in the best interests of the people  
20 of the State of California that ***the Attorney General be provided with the resources*** needed to  
21 develop and maintain the Attorney General's capability to provide competent legal representation  
22 of state agencies and employees ***in any judicial*** or administrative adjudicative ***proceeding***." *Id.* at  
23 § 11040(a) (emphasis added). Access to documents from state agencies are "resources needed" for  
24 the California Attorney General "to provide competent legal representation of state agencies" in this  
25 action.

26 Indeed, the California Attorney General confirmed that its office could represent all of the  
27 California agencies at issue, if Meta were to serve those agencies with a subpoena in this matter.  
28 [Dkt. 738-1 at 4–5]. The Court notes that the State Attorneys General have filed an Administrative

1 Motion to file supplemental information that Meta has recently served an intent to issue subpoenas  
2 to various state agencies, including the California Department of Child Support Services, the  
3 California Department of Education, and the California Mental Health Services Oversight and  
4 Accountability Commission. [Dkt. 1031-3 at 27–153]. None of these state agencies are allowed to  
5 employ legal counsel other than the California Attorney General absent written consent, and no such  
6 consent has been presented thus far. Accordingly, and based on the record before the Court, it  
7 appears that under the statutory scheme each will be represented by the California Attorney General  
8 in this matter for discovery, whether because of the intended subpoenas or because the Court finds  
9 control for purposes of discovery. *See* Cal. Govt. Code § 11040(a). Thus, as a matter of the efficient  
10 and rational administration of justice in this case, because the California Attorney General will be  
11 involved in representing these state agencies in any event in this case (whether to respond to  
12 subpoenas or to respond to party discovery), the Court in its discretion determines that a finding of  
13 control is further supported by the simple and pragmatic realities involved in these circumstances.

14 At oral argument, counsel for the California Attorney General argued that, even if the Court  
15 found that the California Attorney General had legal access and control over the California state  
16 agencies’ materials, those state agencies could disagree and simply refuse to provide requested  
17 documents to the California Attorney General and could hypothetically put the California Attorney  
18 General in a position of being at risk of sanctions through no fault of its own. This is a variation on  
19 the “virtual veto” argument, discussed above, which the Court finds unpersuasive to rebut the  
20 finding of control. The California Attorney General’s argument asserts that their office lacks any  
21 legal mechanism to force or require compliance from the state agencies, which in their view  
22 demonstrates lack of control. *Id.* This argument is without merit. First, this argument rests entirely  
23 on an unreasonable, unfounded, hypothetical assumption that, despite this Court issuing an Order  
24 finding control, the state agencies would simply refuse to provide documents based on nothing more  
25 than an obstinate and unreasoned disagreement. The California Attorney General presented no facts,  
26 no affidavits, no prior examples of state agency refusals, and no testimony to support this feared  
27 response by California state agencies.

28 Indeed, in many analogous cases in which a California prison official was sued individually,



the courts found that the individual official had control over documents of a state agency (the California Department of Corrections and Rehabilitation (CDCR)) and thus the state agency was subject to party discovery – and those findings are based in part on the fact that the individual party defendants were represented by and/or employed by the California Attorney General:

If Defendants seek to avoid production by contending that they are not in possession, custody or control of the requested documents, their objection is denied. The specific facts of this action render such an objection unfounded. By virtue of their employment with non-party CDCR, individual defendants are represented by the Attorney General's Office. It is this Court's experience that either individual defendants who are employed by CDCR and/ or the Attorney General can generally obtain documents, such as the ones at issue here, from CDCR by requesting them. They have constructive control over the requested documents, and the documents must be produced.

*Pulliam*, 2011 WL 335866, at \*1; *see also Quiroga*, 2013 WL 6086668, at \*2 (affirming Magistrate Judge order finding defendant has control over third-party agency documents: "it is this Court's experience that either individual defendants who are employed by CDCR, and/or the Attorney General who represents them, can generally obtain documents from CDCR by requesting them. If this is the case, then, based on their relationship with CDCR, they have constructive control over the requested documents and the documents must be produced."); *accord Mitchell*, 2009 WL 674348, at \*9, 11–13, 17 (rejecting multiple objections regarding alleged lack of control of agency documents).

Similarly, in *Zackery*, the Court overruled the objection that the named defendants lacked control over the documents of a third-party agency. *Zackery*, 2007 WL 1655634, at \*4. The *Zackery* Court granted relief to the Plaintiff seeking discovery as follows: "the court will direct **counsel for defendants** [Office of the City Attorney] to make the necessary inquiries and arrangements for the requested citizen complaint records to be produced to plaintiff." *Id.* These California precedents make clear that courts in California have in fact found control in numerous factual situations in which the involvement of the same prosecuting attorneys (often the California Attorney General) representing both a named party and the third-party agency supported the conclusion of control such that the California agency documents were subject to party discovery.

To be clear, the Court is not relying on these precedents to demonstrate the practical ability

of the state Attorney General to obtain documents from the state agencies, rather these precedents rebut and demonstrate exactly the opposite of the hypothetical fear of agency refusal posited by the state Attorneys General as a reason why they should be found not to have control for purposes of discovery. Contrary to the unfounded assumption that state agencies will refuse to provide documents, the Court presumes, instead, that parties (including third parties such as the agencies at issue here) will act reasonably in the face of a court Order and will comply with the Federal Rules of Civil Procedure. “We think that surely one must assume that litigants will obey court orders. Once we assume otherwise, then our system of jurisprudence is in serious trouble.” *E. I. du Pont de Nemours & Co. v. Finklea*, 442 F. Supp. 821, 825 (S.D. W. Va. 1977); *see also Casas v. City of Baldwin Park*, No. B270313, 2017 WL 1153336, at \*6 (Cal. Ct. App. 2017) (The Court recognized the existence of “the legal presumption that defendants had regularly discharged their duties and complied with the court’s order.”).

Second, this argument ignores the fact that Meta has the ability to file a motion to compel production of documents by any such hypothetically disagreeing state agencies, and thus there is indeed a procedural and legal avenue to enforce compliance from any such hypothetically intransigent agencies. The state Attorneys General’s argument that they lack legal mechanism to force compliance from their state agencies is myopic. Should Meta be required to file a motion to compel, the Court is perspicacious enough to understand that the fault would lie with the hypothetical state agency and not the California Attorney General, and in the event some enforcement mechanism were needed (such as the hypothetically feared sanctions), the Court would presumably have the wisdom to understand how and where to focus any such enforcement Order.

Finally, the Court is not persuaded by the argument that the California Attorney General lacks control over state agency documents, because an attorney in a court proceeding can simply do nothing when faced with a client who (hypothetically here) refuses to collect or provide documents for production in discovery. As counsel for a party subject to discovery, the California Attorney General has the legal authority and duty to take action to make inquiry and collect the documents from the uncooperative state agencies directly, and cannot simply sit on their hands in the face of an uncooperative client – this is would not be the first time an attorney was faced with a client who

1 was difficult to deal with in collecting documents for discovery. *See, e.g., Qualcomm Inc.*, 2010  
2 WL 1336937, at \*2–5. Counsel in a litigation has legal duties to take pro-active steps in supervising  
3 and searching for documents in discovery that go far beyond simply acceding to a client who fails  
4 to (or worse, refuses to) produce or provide documents. *Id.* at \*2–5 (detailing “Discovery Errors”  
5 by counsel); *Rodman*, 2016 WL 5791210, at \*3–4 (awarding discovery sanctions where, in part,  
6 “there is no indication that Safeway’s counsel guided or monitored [client employee] Mr. Guthrie’s  
7 search of the legacy drive in any significant way.”). Counsel cannot simply advise clients about  
8 document requests and leave it up to the client to decide whether or not to risk sanctions for failure  
9 to produce – in appropriate circumstances, counsel may need to personally conduct or directly  
10 supervise a client’s collection, review, and production of responsive documents. *Optronic Techs.,*  
11 *Inc.*, 2020 WL 2838806, at \*5–7 (awarding discovery sanctions; “It is not enough for counsel to  
12 provide advice and guidance to a client about how to search for responsive documents, and then not  
13 inquire further about whether that advice and guidance were followed . . . . The Court does not  
14 conclude that counsel must always personally conduct or directly supervise a client’s collection,  
15 review, and production of responsive documents. However, in the circumstances presented here,  
16 the Court finds that [counsel] Sheppard Mullin did not make a reasonable effort to ensure that  
17 [sanctioned party] Ningbo Sunny produced all the documents responsive to Orion’s requests and  
18 thus violated its obligations under Rule 26(g)(1)(B) . . . . [T]he Court orders Ningbo Sunny’s new  
19 counsel of record to undertake an independent effort to ensure that Ningbo Sunny fully complies  
20 with Orion’s post-judgment document requests.”). The Court rejects as legally erroneous the  
21 California Attorney General’s arguments, because they are based on a misunderstanding of  
22 counsel’s role (and duties) in discovery and the available procedures under the Federal Rules for the  
23 proper conduct of discovery and the rational administration of justice. *See King*, Case No. 20-cv-  
24 04322-LGS-OTW, Dkt. 272, slip op. at 2 (“embroil[ing the judge] in day-to-day supervision of  
25 discovery [is] a result directly contrary to the overall scheme of the federal discovery rules.”).

26 In addition to their duties to supervise the collection of documents and make inquiry of  
27 clients to ensure proper collection of documents is undertaken, attorneys representing clients in court  
28 proceedings have legal duties under the Federal Rules of Civil Procedure to work cooperatively to

improve the administration of civil justice, both as officers of the Court and under their ethical obligations as members of the bar of this Court. *See* Fed. R. Civ. P. 1 advisory committee’s note to 2015 amendment. “Rule 26(g) imposes ***an affirmative duty to engage in pretrial discovery in a responsible manner*** that is consistent with the spirit and purposes of Rules 26 through 37 . . . . The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that ***obliges each attorney*** to stop and think about the legitimacy of a discovery request, ***a response thereto, or an objection*** . . . . If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.” *See* Fed. R. Civ. P. 26 advisory committee’s note to 1983 amendment.

As the Ninth Circuit has recognized, “legal duties” are jural correlatives and logically antecedent to “legal rights” – and thus the California Attorney General’s legal duties to undertake proactive efforts to collect documents from clients in discovery are the flip side to the legal right to access those documents. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 790 n.5 (9th Cir. 2002) (“The logical relationship between rights and duties has been the subject of considerable academic examination. Wesley Hohfeld famously described rights and duties as ‘jural correlatives’—different aspects of the same legal relation. Oliver Wendell Holmes described rights as ‘intellectual constructs used to describe the consequences of legal obligations. [sic] As he puts it [in *The Common Law* (1881)], ‘legal duties are logically antecedent to legal rights.’”) (internal citations omitted). Here, the recognition that a state Attorney General, presumptively counsel for state agencies here, has legal duties to supervise the collection of (and possibly directly obtain) documents from those agencies for discovery lends further support to the conclusion that the state Attorney General has the legal right to access those documents. That is, counsel’s legal duty to ensure collection of documents from a client is a different aspect of (and correlates juridically to) a legal right to access those documents, and thus supports the conclusion of control for purposes of discovery.

The California Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the California Attorney General would necessarily have access to and thus control over the

relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the California Attorney General argues that these agencies are “separate entities under law” from the state Attorney General and are not supervised by the state Attorney General, *see* *dk. 738-3* at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the agencies “operate outside the California Attorney General’s authority” or are “established as a separate entity, under various laws or constitutional provisions” is simply re-stating the issue, *id.*, and not determinative of the issue. Arguing that the agencies are “controlled” by the Governor or another “independently elected official” in a “divided executive” under the California Constitution, *id.*, confuses and conflates the “legal control” issue for discovery with “operational

control” or “independence” and thus constitutes a legally erroneous argument.

Further, there is no statutory, legal, or administrative rule cited which prohibits the California Attorney General from accessing the documents of the state agencies at issue. Nor is there citation to any statutory or legal prohibition on the California Attorney General’s representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization (the Attorney General) is both a party to the case while also acting as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather under the particular facts here and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

Consistent with the analysis of this issue as raised by other state Attorneys General, the Court finds the California Attorney General’s “virtual veto” argument unpersuasive. [Dkt. 738-3 at 2]. As explained above (and incorporated herein by reference), the “virtual veto” argument is entirely speculative. This argument is based on an unfounded assumption that state agencies would inexplicably obstruct a state attorney general’s independent law enforcement responsibilities. The argument also directly contradicts the well-established legal principle and statutory scheme that a state Attorney General, acting as counsel, inherently has access to relevant documents to effectively represent a state agency.

Finally, the Court has recognized that the issue of control of state agency documents when a State is a party has been litigated and decided against numerous States in a previous Multi-District



Litigation involving most of the same States and state Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, California is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* As discussed above, the California Attorney General has, from this Court’s review of precedent, repeatedly litigated and lost on the analogous issue of control of state agency documents in cases involving a state official sued individually, typically involving control over documents of the California Department of Corrections and Rehabilitation. Other states have apparently repeatedly litigated and lost the same issue, resulting in one court within the Ninth Circuit warning a state Attorney General to avoid unnecessarily multiplying the proceedings and risk sanctions. *Emanuel v. Collins*, No. 3:20-CV-0566-RCJ-CLB, 2022 WL 22236619, at \*3 n.2 (D. Nev. July 20, 2022) (Finding control: “This Court has expressly rejected similar arguments made by NDOC [(Nevada Department of Corrections)] and its counsel in the past. Therefore, Defendants and their counsel are cautioned and reminded that improper discovery conduct in this, or other cases, may result in discovery sanctions in the future.”) (citation omitted). Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states in that case, given that California was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, and further given the California Attorney General’s repeatedly litigating and losing a similar control issue in the face of multiple reasoned decisions adverse to the California Attorney General, this Court is disappointed that the California Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where (as here) there is guidance in precedent on the discovery issue at hand.

### III. COLORADO

In opposition to the control issue, the Colorado Attorney General argues primarily the

following factors: (1) the Colorado Attorney General brought the lawsuit under its own independent law enforcement capacity; (2) the Colorado legislature has recognized that the Colorado Attorney General cannot access Colorado agencies’ documents when it is acting in its enforcement capacity; and (3) the Colorado Attorney General is a separate entity and independent from the Colorado agencies. [Dkt. 738-4 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) Colorado agencies are proscriptively barred from retaining litigation counsel other than the Colorado Attorney General; (2) the Colorado Attorney General has already confirmed that it would represent the identified agencies in responding to a Meta subpoena; and (3) the Colorado Attorney General admits that it intends to assert privilege claims. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Behavioral Health Administration; Department of Education; Department of Higher Education; Department of Human Services; Department of Regulatory Agencies; Office of the Governor; Office of Economic Development & International Trade; and Office of State Planning and Budgeting. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Colorado Attorney General does have legal control, for purposes of discovery, over the Colorado agencies in dispute. While the Colorado Attorney General is a separate entity and while the Colorado Attorney General did bring the instant action pursuant to its own independent authority, this does not outweigh the requirement that the Colorado Attorney General must statutorily act as the Colorado agencies’ counsel. Colo. Rev. Stat. § 24-31-101(1)(a). Under Colorado’s statutory scheme, “[t]he attorney general: ***Shall act*** as the chief legal representative of the state ***and be the legal counsel*** and advisor ***of each*** department, division, office, board, commission, bureau, and ***agency of state government***[.]”). *Id.* (emphasis added); *see also* Colo. Rev. Stat. § 24-31-111(1) (“The attorney general ***shall*** provide legal services for each state agency as provided in section 24-31-101.”) (emphasis added). Under Colorado law, “[n]o state agency shall appoint, solicit, or employ any person to perform legal services except in accordance with this part 1.” Colo. Rev. Stat. § 24-31-111(2). None of the statutory exceptions in section -111, which requires a finding by the Colorado Governor of a failure or refusal to provide legal representation

by the Colorado Attorney General, are argued or present in this case. Colo. Rev. Stat. § 24-31-111(5).

Indeed, the Colorado Attorney General confirmed that its office will represent all of the Colorado agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 6]. The Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Colorado Behavioral Health Administration and the Colorado Department of Education. [Dkt. 1031-3 at 154–237]. Neither of these state agencies are allowed to employ legal counsel other than the Colorado Attorney General absent a finding by the Colorado Governor that the Colorado Attorney General has been unable, failed to, or refuses to provide legal services to the agencies, and no exceptions to an agency’s prohibition on employing separate counsel has been presented thus far. *See* Colo. Rev. Stat. § 24-31-111(5). Accordingly, it appears that under the statutory scheme each agency will be represented by the Colorado Attorney General in this matter for discovery. *See* Colo. Rev. Stat. § 24-31-101(1)(a). Thus, because the Colorado Attorney General appears likely to be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Colorado Attorney General has taken the position that communications between the Colorado Attorney General and these state agencies would be covered by the attorney-client privilege when the Colorado Attorney General is legal counsel for a state agency. [Dkt. 738-4 at 2]. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. To the extent the Colorado Attorney General is asserting that the attorney-client privilege applies to communications between the Colorado Attorney General’s office and the agencies at issue when they are represented (as they will be here) by that office, that further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Colorado Attorney General from accessing the documents of the state agencies at issue. While the Colorado Attorney General cites a statute which requires their office to enter into information sharing agreements with state licensing agencies in enforcement actions, none of the agencies at issue here are licensing agencies. Colo. Rev. Stat. § 6-1-116(4). Indeed, it is clear that the Colorado Legislature’s view is that “it best serves the consumer protection interests of the state to allow a licensing authority to share with a district attorney or the attorney general information regarding a regulated person, which information may be relevant to a consumer protection investigation of the regulated person” and that “District attorneys and the attorney general are tasked with, and have the expertise needed for, enforcing consumer protection laws in the state.” Colo. Rev. Stat. § 6-1-116(1)(b)–(d). Viewed in context, the Colorado Legislature expressed its intention that these state licensing authorities would share information with the Colorado Attorney General specifically to “*facilitate* the investigation and *enforcement of complaints* alleging violations of consumer protection or unfair trade laws.” Colo. Rev. Stat. § 6-1-116(4) (emphasis added). Thus, the cited statute does not serve as a prohibition on the Colorado Attorney General’s access to these licensing agencies’ documents, but to the contrary serves as an encouraged means for sharing information in order to “facilitate” enforcement actions. The statute provides for a procedural, legal mechanism, approved by the Colorado Legislature, for these licensing agencies to share information with the Colorado Attorney General. If anything, the statute cited by the Colorado Attorney General further supports a finding of legal right of access and thus control over these licensing agency documents, and the Court finds the Colorado Attorney General’s characterization of this statute as barring access or evidence of lack of right to access as erroneous.

Further, to the extent the Colorado Attorney General argues that there must be an information sharing agreement from licensing agencies in order to disclose the agencies’ records, this argument is in essence the same “virtual veto” argument advanced by several other states’ Attorneys General and discussed above. As explained previously, the Court finds the “virtual veto” argument to be speculative and unpersuasive. This argument is based on an unfounded assumption that state agencies would inexplicably obstruct a state’s attorney general’s independent law enforcement

responsibilities. The argument also directly contradicts the well-established legal principle and statutory scheme that a state attorney general, acting as counsel, inherently has access to relevant documents to effectively represent a state agency. Finally, as noted, none of the Colorado agencies at issue in this case are licensing authorities and thus the statute regarding an information sharing agreement is not applicable to the agencies under consideration here.

There is no citation to any statutory or legal prohibition on the Colorado Attorney General's representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control."). Indeed, one court has noted that "[i]n general, an attorney is presumed to have control over documents in its client's possession." *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharms.* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 365 n.5. In that case, Colorado is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources

1 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the  
2 control issue against all the remaining objecting states and given that Colorado was able to reach a  
3 negotiated resolution of the dispute in that Multi-District Litigation, the Court is disappointed that  
4 the Colorado Attorney General and Meta unable to reach a negotiated resolution here as well. As  
5 the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences,  
6 they should make every effort to work out discovery disputes through reasonable, good faith  
7 negotiations between able and experienced counsel, particularly where, as here, there is guidance in  
8 precedent on the discovery issue at hand.

#### 9 **IV. CONNECTICUT**

10 In opposition to the control issue, the Connecticut Attorney General argues primarily the  
11 following factors: (1) the Connecticut Attorney General brought the lawsuit under its own  
12 independent law enforcement capacity; (2) the Connecticut Attorney General is a separate entity  
13 and independent from the Connecticut agencies; and (3) the Connecticut agencies would create a  
14 “virtual veto” over the Connecticut Attorney General’s independent responsibilities to bring  
15 enforcement actions. [Dkt. 738-5 at 2].

16 In support of a finding of control with regard to these state agencies’ documents, Meta argues  
17 primarily that the Connecticut Attorney General must act as counsel for the Colorado agencies. *Id.*  
18 at 3. Here, Meta seeks discovery from the following agencies: Commission for Educational  
19 Technology; Department of Consumer Protection (the agency responsible for “authoriz[ing] the  
20 [Connecticut Attorney General]” to bring this suit); Department of Economic and Community  
21 Development; Department of Education; Department of Mental Health and Addiction Services;  
22 Department of Public Health; Department of Children and Families; Office of Health Strategy;  
23 office of Higher Education; Office of Policy and Management; Office of the Child Advocate; Office  
24 of the Governor; and Office of the State Comptroller. *Id.*

25 After considering the factors argued in the briefs, the Court finds that the factors weigh in  
26 favor of a finding that the Connecticut Attorney General does have legal control, for purposes of  
27 discovery, over the Connecticut agencies in dispute. While the Connecticut Attorney General is a  
28 separate entity and while the Connecticut Attorney General did bring the instant action in its own



independent authority, this does not outweigh the requirement that the Connecticut Attorney General must statutorily act as the Connecticut agencies’ counsel. Conn. Gen. Stat. § 3-125.

Under Connecticut’s statutory scheme, “[t]he Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction.” *Id.* Further, the Connecticut Attorney General “shall appear for . . . all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters, and institutions . . . in all suits and other civil proceedings . . . in which the state is a party or is interested . . . in any court or other tribunal, as the duties of his office require[.]” *Id.* Such representation is for “all such suits shall be conducted by [the Connecticut Attorney General] or under [their] direction.” *Id.*

Indeed, the Connecticut Attorney General confirmed that its office will represent all of the Connecticut agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 7–8]. Accordingly, it appears undisputed that under the Connecticut statutory scheme each will be represented by the Connecticut Attorney General in this matter for discovery. *See* Conn. Gen. Stat. § 3-125. Thus, because the Connecticut Attorney General appears likely to be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Further, the Connecticut Department of Consumer Protection is, under Connecticut law, tasked with authorizing the Connecticut Attorney General to bring Connecticut Unfair Trade Practices Act enforcement actions such as the current action. *See* Conn. Gen. Stat. § 42-110m. The Connecticut Attorney General has taken the position that communications between its office and the Connecticut Department of Consumer Protection regarding authorizing this action (with no limitation as to time frame) is subject to the attorney-client privilege. [Dkt. 738-5 at 2]. By definition, an attorney-client relationship is a prerequisite to assertion of the attorney-client privilege. *See Graf*, 610 F.3d at 1156. Thus, the Connecticut Attorney General’s admission that it has an existing (indeed pre-existing) attorney-client relationship with this specific state agency regarding this matter lends further support for a finding of a legal right of access and thus control over the documents of the Connecticut Department of Consumer Protection. Regardless of whether

1 or not there is control with regard to the other Connecticut state agencies, the position of the  
2 Connecticut Department of Consumer Protection is markedly different and, at a minimum, the Court  
3 finds that the Connecticut Attorney General's office has legal right to access and thus control over  
4 the documents of the Connecticut Department of Consumer Protection for purposes of discovery in  
5 this matter.

6 Relatedly, the Connecticut Attorney General has taken the position that communications  
7 between the Connecticut Attorney General and the other state agencies at issue would be covered  
8 by the attorney-client privilege when the Connecticut Attorney General is legal counsel for those  
9 state agency. [Dkt. 738-4 at 2]. "[T]o the extent that [the State] asserts an attorney-client privilege  
10 with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the  
11 State to argue that on one hand the [State] Attorney General represents these individuals, but that  
12 for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure  
13 45." *Perez*, 2014 WL 1796661, at \*2. The fact that the Connecticut Attorney General is asserting  
14 the attorney-client privilege applies to communications between the Connecticut Attorney General's  
15 office and the agencies at issue when they are represented (as they will be here) by that office further  
16 supports the conclusion of control here.

17 In addition, there is no statutory, legal, or administrative rule cited which prohibits the  
18 Connecticut Attorney General from accessing the relevant documents of any of the state agencies at  
19 issue. There is no citation to any statutory or legal prohibition on the Connecticut Attorney  
20 General's representing the state agencies in this matter for purposes of discovery. The Court  
21 recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the  
22 attorney general, is both a party to the case while also acting as counsel for a third party. However,  
23 this would not be the first time that a legal services provider, as counsel for a party, is found to have  
24 control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649,  
25 at \*4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this  
26 court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34  
27 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive  
28 materials over which Salas and his law firm had possession, custody or control."). Indeed, one court

1 has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s  
2 possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be  
3 a finding of a legal right of access to and thus control over third party client documents in every  
4 case involving a legal services provider as a party; rather, under the particular facts here, and under  
5 the totality of circumstances viewed in light of applicable legal standards, the Court finds that  
6 control exists here.

7 The Connecticut Attorney General’s role as counsel for the agencies at issue inherently  
8 involves obtaining necessary documents for effective representation in litigation. In acting as  
9 counsel, the Connecticut Attorney General would necessarily have access to and thus control over  
10 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,  
11 at \*5–6 (finding state Attorney General has control over agency documents “based on his broad  
12 statutory and common law powers to control and manage legal affairs on behalf of state agencies,  
13 has a legal right to obtain responsive documents from the state agencies referenced in the  
14 Complaint”). To the extent the Connecticut Attorney General argues that the Connecticut  
15 Constitution establishes the Governor and the Attorney General as “independently elected officials  
16 filling separate constitutionally created offices,” *see* dkt. 738-5 at 2, that argument misapprehends  
17 the “legal control” test for documents – the issue is not simply whether the two entities are legally  
18 separate (such as two different and separately incorporated entities or legally established entities),  
19 but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The  
20 control analysis for Rule 34 purposes does not require the party to have actual managerial power  
21 over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude*  
22 *Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state  
23 Attorney General and the state agencies (a relationship mandated by state law) necessitates close  
24 coordination. While operational control may be a factual situation which demonstrates a legal right  
25 to obtain the documents, the absence of such “executive or functional control” is not determinative  
26 for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for  
27 discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity  
28 were involved, there would be no dispute that party discovery covered that one entity. As discussed

1 above, courts have found “control” for purposes of discovery where a party is clearly not in  
2 managerial control over the third-party, such as a subsidiary having control over the documents of  
3 a parent corporation, or an individual government officer having control over the documents of an  
4 entire agency. Thus, arguing that the Connecticut Attorney General is separate from the executive  
5 branch agencies under the control of the Governor is merely a restatement of the issue and not  
6 determinative of the issue. *Id.* Arguing that the agencies are “controlled” by the Governor (who is  
7 an “independently elected official” in a “dual executive” under the Connecticut Constitution)  
8 confuses and conflates the “legal control” issue for discovery with “operational control” or  
9 “independence” and thus constitutes a legally erroneous argument.

10 Finally, to the extent the Connecticut Attorney General asserts essentially the same “virtual  
11 veto” argument advanced by several other States’ Attorneys General, as discussed above the Court  
12 finds the “virtual veto” argument to be speculative and unpersuasive. This argument is based on an  
13 unfounded assumption that state agencies would inexplicably obstruct a state’s attorney general’s  
14 independent law enforcement responsibilities. The argument also directly contradicts the well-  
15 established legal principle and statutory scheme that a state attorney general, acting as counsel,  
16 inherently has access to relevant documents to effectively represent a state agency.

17 Indeed, at least one other federal court has previously found that the Connecticut Attorney  
18 General has legal control over Connecticut state agency materials. *Generic Pharmaceuticals (II)*,  
19 699 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent  
20 with the applicable legal standards discussed above and in light of the facts and circumstances  
21 presented here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly  
22 consistent with, and to that extent further persuasively supports, the conclusion here with regard to  
23 the Connecticut Attorney General’s having control with regard to documents of the state agencies  
24 at issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all  
25 the objecting states including Connecticut, this Court is disappointed that the Connecticut Attorney  
26 General and Meta were unable to reach a negotiated resolution of this dispute, which other states  
27 were able to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties  
28 at multiple Discovery Management Conferences, they should make every effort to work out

discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

Therefore, the Court concludes that the Connecticut Attorney General has legal control, for the purposes of discovery, over the documents held by the Connecticut agencies listed by Meta.

## V. DELAWARE

In opposition to the control issue, the Delaware Attorney General argues primarily the following factors: (1) Delaware law explicitly indicates that the Delaware Department of Justice does not have a right to access Delaware state agency documents in lieu of discovery under a state statute; and (2) Delaware case law has previously held that control over documents turns on whether a party has the power, unaided by courts, to force document production. [Dkt. 738-6 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that Delaware agencies are proscriptively barred from obtaining counsel other than the Delaware Attorney General, without consent from the Delaware Attorney General and the Governor of Delaware. *Id.* at 3 (citations omitted). Here, Meta seeks discovery from the following agencies: Department of Education; Department of Health and Human Services; Department of Services for Children, Youth and Families; Office of Management and Budget; and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Delaware Attorney General has legal control, for purposes of discovery, over the Delaware agencies in dispute. The Court finds that mandatory representation by the Delaware Attorney General, subject to consent of the Delaware Attorney General and Governor of Delaware, weighs heavily towards a finding of legal control.

The Delaware Attorney General heavily relies on a statutory argument based on Title 29, § 250(b) of the Delaware Code, which states:

The Attorney General shall have the right of access at all times to the books, papers, records and other documents of any officer, department, board, agency, instrumentality or commission of the state government. The Attorney General shall not have this right of access for purposes of discovery in any civil actions brought by or on the relation of the Attorney General other than for the books, papers, records, and documents of the Department of Justice.

The Delaware Attorney General argues that the second sentence should be interpreted to

1 prohibit the Delaware Attorney General any possible right to access the documents of any state  
2 agencies “for purposes of discovery” in any action filed by the Attorney General. [Dkt. 738-6 at 2].  
3 The Delaware Attorney General’s interpretation of the statute is contrary to the express language of  
4 the statute cited. The first sentence of Section 2508(b) gives the Attorney General a broad right to  
5 access the documents of state agencies on demand. The second sentence of Section 2508(b) says  
6 that “[t]he Attorney General shall not have this right of access” to the documents. The intent of the  
7 statute is thus clear – in investigations, in defense of civil action, and in criminal actions, the  
8 Delaware Attorney General has a broad right to access state agency documents. In civil actions  
9 initiated by the Delaware Attorney General, the statute simply provides that the Delaware Attorney  
10 General cannot rely on this statute as a substitute for discovery in that action. However, contrary to  
11 the Delaware Attorney General’s argument, this statute does not take away every or any other right  
12 the Attorney General may have to access the documents of state agencies. At best, the second  
13 sentence of Section 2508(b) puts the Delaware Attorney General in the same position as most (if  
14 not all) of the other state Attorneys General with regard to control – there being no express statutory  
15 right to access documents, the Court examines whether other sources of law provide that right. The  
16 second sentence of Section 2508(b) indicates a legislative intent to require the Attorney General to  
17 use other available avenues to obtain documents from state agencies in connection with civil  
18 litigation, and an intent to disallow the Attorney General to use this statute as an end-around normal  
19 discovery procedures. This statute does not prohibit or forbid the Delaware Attorney General from  
20 seeking agency documents using any such other available or normal processes.

21 The Delaware Attorney General further argues that this statute “is thus consistent with the  
22 general rule in Delaware that ‘attorneys do not exercise control over their clients’ property.’” Dkt.  
23 738-6 at 2 (citing *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, No. CIV.A. 3874-VCS, 2009 WL  
24 2501542, at \*4 (Del. Ch. Aug. 5, 2009)). First, the decision by the Delaware Attorney General to  
25 cite *Sokol* is unusual because that case involved a motion to transfer jurisdiction from the Chancery  
26 court to Colorado Superior Court. In so holding, the Delaware court stated that “[t]his case has no  
27 relevant connection to Delaware, and Delaware law has no bearing on it.” *Sokol*, 2009 WL 2501542,  
28 at \*5. Accordingly, the Delaware Attorney General’s argument that *Sokol* demonstrates a “general



rule in Delaware” is undercut by the very case they cite, and the Court does not credit the argument for that reason alone.

Second, the excerpt from *Sokol* quoted by the Delaware Attorney General has no bearing on control for purposes of discovery. *Sokol* involved a dispute between a law firm and a former client over alleged overbilling of fees and alleged breach of fiduciary duty, and the parties there disputed whether subject matter jurisdiction was proper in Chancery Court or in a Superior Court which can hear professional negligence (i.e., legal) claims. The statement quoted from *Sokol* by the Delaware Attorney General in this Court is a passage distinguishing the scope of the attorney-client relationship from the scope of a fiduciary duty of a trustee when they control property of another as a fiduciary. *Id.* at \*4. The *Sokol* opinion’s statement, viewed in proper context, indicates that attorneys do not control under the rules governing fiduciary duties the property of a client. And *Sokol* recognized that there can, in fact, be “circumstances in which an attorney exercises control over the property of a client.” *Id.*

Further, the Court notes that *Sokol*’s analysis is consistent with this Court’s analysis of the close relationship between attorneys and clients regarding control for purposes of discovery discussed above. The *Sokol* opinion states that “attorneys simply hold positions of heightened trust . . . which requires the attorney to meet certain professional standards.” *Id.*

Facially, this statute makes no mention of attorney controlling client property and thus does not support the Delaware Attorney General’s argument. More importantly, this argument erroneously confuses property ownership concepts with control for purposes of discovery. In *In Synopsys*, Judge Chen found control where “the word control does not require that the party have legal ownership or actual physical possession of the documents at issue.” *Synopsys*, 2006 WL 1867529, at \*2 (citation and internal quotations omitted). Indeed, “while courts have cautioned that “[l]egal ownership is not determinative of whether a party has . . . control of a document for the purposes of Rule 34 the court takes this to mean: if the third-party has ‘legal ownership’ of the document, the inquiry as to control does not end there. Conversely, if a party does have legal ownership, as here, the court finds a strong indication that defendants possess the very definition of ‘control’ over these documents.” *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513, 521 (D.

1 Kan. 2007) (internal quotations omitted); *see also* 7 Moore’s Federal Practice – Civil § 34.14  
2 (“Legal restrictions that may limit a party’s ability to obtain certain documents or to disclose them  
3 to others will not necessarily preclude a finding that the party has possession, custody, or control  
4 over those documents.”).

5 The Delaware Attorney General relies on not only *Sokol* and other Delaware state caselaw  
6 to argue lack of control. [Dkt. 738-6 at 2]. The Delaware Attorney General cites *Deephaven Risk*  
7 *Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, No. CIV.A. 379-N, 2005 WL 1713067, at \*11 (Del.  
8 Ch. July 13, 2005), for the proposition that the “key inquiry” for control “is whether they have “the  
9 power, unaided by the courts, to force production of the documents.” First, *Deephaven* is an  
10 unpublished Chancery Court opinion applying Delaware’s statutory scheme under Section 220 of  
11 Title 8 of the Delaware Code, for a shareholder to inspect the records kept by a Delaware corporation  
12 as a fiduciary for its shareholders, which is a far cry from Rule 34. *Id.* As discussed above, control  
13 of property by someone acting under a fiduciary duty is not the same legal standard for control of  
14 documents under Rule 34, and to the extent the Delaware Attorney General asserts otherwise, that  
15 argument is legally erroneous. Second, the Delaware Attorney General also argues here that its  
16 argument based on *Deephaven* is supported by another state law case, *Weinstein Enterprises, Inc.*  
17 *v. Orloff*, 870 A.2d 499, 510 (Del. 2005). [Dkt. 738-6 at 2]. That case is not helpful or germane to  
18 the issues here. *Weinstein*, like *Deephaven*, concerned inspection of documents controlled by a  
19 subsidiary corporation, and the *Weinstein* opinion makes clear that the analysis under Delaware’s  
20 Section 220 requires two different types of specific control, the first being the “fiduciary” control  
21 discussed above, and the second being “actual control” to control operations of a subsidiary  
22 organization to force that entity to provide its financial documents for inspection. *Weinstein*, 870  
23 A.2d at 511–12. The discussion in *Weinstein* regarding whether court enforcement of a duty to open  
24 documents up for corporate inspection is specifically based on the text of Section 200, and  
25 jurisprudence under that state law. *Id.* The cited passage from *Weinstein* nowhere uses the phrase  
26 “key inquiry” and nowhere equates Section 220 with Rule 34. Fundamentally, the Court finds the  
27 Delaware Attorney General’s arguments based on Section 220 and Delaware Chancery Court  
28 precedent to be legally irrelevant. Indeed, the Court has serious concerns about the manner in which

1 the control issue was presented and briefed by several of the state Attorneys General, including the  
2 Delaware Attorney General, given how attenuated these state law arguments are from the law under  
3 Rule 34.

4 To be clear, the Court rejects the argument that a “key inquiry” under Rule 34 is whether the  
5 party involved has “the power, unaided by the courts, to force production of the documents.” Indeed,  
6 the issue of control under Rule 34 only requires determining if there is a “legal right” to access or  
7 obtain the documents upon demand. Often, a party with a “legal right” must, in fact, use the court  
8 system to enforce and validate that right. Nothing in the text of Rule 34 or the Federal Rules of  
9 Civil Procedure state, much less imply, that control is to be construed as a discretionary, extra-  
10 judicial exercise of “power” (unlike the Delaware statute and case law relied upon heavily by the  
11 Delaware Attorney General here). To the contrary, the Federal Rules contemplate and provide  
12 measures for parties to seek judicial relief when confronted with a party refusing to produce  
13 documents in discovery. *See, e.g.*, Fed. R. Civ. P. 37. Further, the scheme for discovery under the  
14 Federal Rules contemplate that, in appropriate circumstances, not only can judicial relief for  
15 discovery be sought, but also the courts have the authority to sanction parties (and third parties) for  
16 failure to obey a discovery order, among other conduct. Fed. R. Civ. P. 37(b)-(f). A simple review  
17 of the Federal Rules demonstrates the inapplicability of Delaware’s statutory scheme as analogous  
18 for purposes of this dispute.

19 Further, as discussed in the Legal Standards section above, the inquiry regarding control for  
20 purposes of Rule 34 discovery is a federal question, governed by the Federal Rules of Civil  
21 Procedure. As discussed above, even if the Delaware Attorney General’s interpretation of Section  
22 2508 were correct, that state statute can not preempt federal law, and Delaware’s Section 220, and  
23 related case law, are not persuasive in evaluating the control issue under Rule 34, because that  
24 statutory scheme is so different from Rule 34. Even though detailed consideration of the specific  
25 factors under a comity analysis are not applicable in this case given the Supremacy Clause of the  
26 U.S. Constitution, the Court has analyzed the cited state law statutes and cases for completeness.  
27 *Cf., e.g., In re Vivendi Universal, S.A. Sec. Litig.*, No. 02CIV5571RJHHBP, 2006 WL 3378115, at  
28 \*2–4 (S.D.N.Y. Nov. 16, 2006) (holding that international comity did not support allowing French

“blocking statute” to prohibit discovery proceeding under Federal Rules of Civil Procedure 34 and 45). The Court’s extensive review of the cited Delaware statute and case law, summarized herein, demonstrates that the Delaware Attorney General’s arguments here are, at best, incorrect as a matter of law, and, at worst, risk raising questions as to counsel’s judgment and credibility.

Because Section 2508 does not operate to foreclose a finding of control under Rule 34, as discussed above, the Court next turns to analyzing the issue of control with regard to other factors. Importantly, the Delaware Attorney General’s arguments do not negate the fact that all but of the Delaware agencies at issue here are barred by Delaware law from obtaining counsel other than the Attorney General, absent consent from the Attorney General. Del. Code. § 2507. Indeed, the Delaware Attorney General confirmed that its office could represent all of the Delaware agencies at issue, if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 8]. As noted above, the Delaware Attorney General has had months to confer with the agencies about whether they would seek consent to obtain different counsel. To date, no such other counsel has entered appearance for the Delaware state agencies, and the Delaware Attorney General has not indicated that it has provided any consents to any of the agencies. Under Delaware’s statutory scheme,

the Attorney General shall have the following powers, duties and authority: . . . to provide legal advice, counsel and services for administrative offices, agencies, departments, boards, commissions and officers of the state government concerning any matter arising in connection with the exercising of their official powers or duties . . . , to represent as counsel in all proceedings or actions which may be brought on behalf of or against them in their official capacity in any court, except in actions in which the State has a conflicting interest, all officers, agencies, departments, boards, commissions and instrumentalities of state government.

Del. Code. § 2504(3) (emphasis added).

Accordingly, based on the record presented to the Court, under the Delaware statutory scheme each agency at issue here will be represented by the Delaware Attorney General in this matter for discovery. *See* Del. Code §§ 2503, 2507. Thus, as a matter of the efficient and rational administration of justice in this case, because the Delaware Attorney General will be involved in representing these state agencies in any event in this case (whether to respond to subpoenas or to

1 respond to party discovery), the Court in its discretion determines that a finding of control is further  
2 supported by the simple and pragmatic realities involved in these circumstances.

3 Relatedly, the Delaware Attorney General has taken the position that communications  
4 between the Delaware Attorney General’s office and these state agencies would be covered by the  
5 attorney-client privilege. [Dkt. 738-6 at 2]. To the extent the Delaware Attorney General has  
6 attempted to subdivide its own office between Delaware Attorney General’s attorneys in the Fraud  
7 and Consumer Division (litigating this case to date) and other attorneys in the Delaware Attorney  
8 General’s Civil Division (who alleged “are responsible for providing legal advice and representation  
9 to the Delaware State Agencies”), *see id.*, in order to somehow argue that the scope of attorney-  
10 client privilege is limited only as to some parts of the state Attorney General’s office but not other  
11 “divisions” of that same organization, that argument is not supported by citation to any law and is  
12 contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing  
13 therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety  
14 of a legal services organization due to well-known rules of imputation of confidences to a legal  
15 services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930  
16 (“When an attorney associates with a law firm, the principle of loyalty to the client extends beyond  
17 the individual attorney and applies with equal force to the other attorneys practicing in the firm. This  
18 principle, known as the ‘rule of imputed disqualification,’ . . . requires disqualification of all  
19 members of a law firm when any one of them practicing alone would be disqualified because of a  
20 conflict of interest . . . . The rule of imputed disqualification applies to both private firms and public  
21 law firms such as a district attorney’s office or the office of the state public defender.”); *accord City*  
22 *of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not  
23 doubt that vicarious disqualification is the general rule, and that we should presume knowledge is  
24 imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper  
25 circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of  
26 imputed knowledge in the context of government attorneys, which presumption could be rebutted  
27 by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government  
28 lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious

1 disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer  
2 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is  
3 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of  
4 the entire prosecuting office is not necessary absent special facts, such as a showing of actual  
5 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public  
6 legal service organizations like private law firms and impute shared confidences among lawyers of  
7 the entire public law entity. Even in jurisdictions which do not automatically impute  
8 disqualification, and shared confidences, to an entire public law office, those courts recognize that  
9 ethical screening or other procedures are required out of recognition that actual (as opposed to  
10 imputed) sharing of confidences may occur and such procedures are required to avoid dissemination  
11 of attorney-client privileged communications within an entire public law organization. This review  
12 of case law demonstrates that no courts support the Delaware Attorney General’s argument that  
13 different individual lawyers in the Delaware Attorney General’s office have *ex ante* separable,  
14 discrete attorney-client relationships.

15 The Court rejects the Delaware Attorney General’s attempt to simultaneously disclaim the  
16 existence of an attorney-client privilege as between the “team” of attorneys currently working on  
17 this case, while apparently attempting to preserve the ability to assert that the privilege applies to  
18 communications between other lawyers in the Georgia Attorney General’s Office and these  
19 agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these  
20 legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue  
21 that on one hand the [State] Attorney General represents these individuals, but that for discovery  
22 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,  
23 2014 WL 1796661, at \*2. To the extent the Georgia Attorney General is asserting that the attorney-  
24 client privilege applies to communications between the Georgia Attorney General’s office and the  
25 agencies at issue, that further supports the conclusion of control here. Assertion of the attorney-  
26 client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*,  
27 610 F.3d at 1156.

28 In addition, there is no citation to any statutory or legal prohibition on the Delaware Attorney



General’s representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

## **VI. FLORIDA**

In opposition to the control issue, the Florida Attorney General argues primarily the following factors: (1) Florida law prevents the Florida Attorney General from accessing documents held by Florida agencies; (2) the Florida Attorney General is a separate entity and independent from the Florida agencies; (3) the Florida Attorney General brought the lawsuit under its own independent law enforcement capacity; and (4) Florida agencies are statutorily responsible for maintaining, preserving, retaining, and providing access to its own records. [Dkt. 738-7 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) Florida agencies are proscriptively barred from obtaining counsel other than the Florida Attorney General, with certain legal exceptions; and (2) the Florida laws, which purportedly prevents the Florida Attorney General from accessing documents held by Florida agencies, are “wholly unrelated to the discovery at issue[.]” *Id.* at 3. Here, Meta seeks discovery from the following agencies: Commerce; Department of Agriculture and Consumer

Services; Department of Children and Families; Department of Education; Department of Health; and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Florida Attorney General does have legal control, for purposes of discovery, over the certain listed Florida agencies. While the Florida Attorney General is a separate entity and while the Florida Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the Florida Attorney General must statutorily act as the Florida agencies’ counsel.

Under Florida’s statutory scheme, the Florida Attorney general “[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state.” Fla. Stat. § 16.01(4). Additionally, the Florida Attorney General “[s]hall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States.” Fla. Stat. § 16.01(5). Moreover, “[t]he Department of Legal Affairs shall be responsible for providing all legal services required by any department, unless otherwise provided by law. However, the Attorney General may authorize other counsel where emergency circumstances exist and shall authorize other counsel when professional conflict of interest is present.” Fla. Stat. § 16.015.

Curiously, the Florida Attorney General takes the position that it would not represent the listed agencies. [Dkt. 738-1 at 9]. However, on the record before the Court, this is an error of law because neither of these agencies are exempt from the express prohibition on retaining different counsel. Accordingly, it appears undisputed that under the Florida statutory scheme each state agency at issue here will be represented by the Florida Attorney General in this matter for discovery. *See* Fla. Stat. § 16.01(4). Thus, because the Florida Attorney General appears likely to be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Florida Attorney General has not disclaimed whether it will assert that communications between the Florida Attorney General and these state agencies are covered by the

1 attorney-client privilege. [Dkt. 738-7 at 2]. The Florida Attorney General’s argument that “in  
2 Florida, the privilege is not waived by communicating work product or attorney-client privileged  
3 material to another state agency” is circular. *Id.* If there is an attorney client relationship between  
4 the Florida Attorney General and these state agencies, then by definition any such communications  
5 would not operate as a waiver of privilege because they are inherently privileged to begin with.  
6 “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does  
7 so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand  
8 the [State] Attorney General represents these individuals, but that for discovery purposes the  
9 [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL  
10 1796661, at \*2. To the extent the Florida Attorney General is attempting to preserve the ability to  
11 assert the attorney-client privilege between the Florida Attorney General’s office and the agencies  
12 at issue, that further supports the conclusion of control here. Assertion of the attorney-client  
13 privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610  
14 F.3d at 1156.

15 Further, there is no statutory, legal, or administrative rule cited which prohibits the Florida  
16 Attorney General from accessing the relevant documents of any of the state agencies at issue. The  
17 Florida Attorney General’s argument that two Florida state agencies are required to maintain their  
18 own records is unavailing. [Dkt. 738-7 at 2]. Simply having a statute that makes these Florida  
19 agencies statutorily responsible for maintaining, preserving, retaining, and providing their own  
20 records does not demonstrate that the Florida Attorney General lacks access to those documents.  
21 First, the statutes cited by the Florida Attorney General relate to records and materials which are  
22 outside the scope of and thus not a restriction on the discovery sought in this case. Fla. Stat. §  
23 893.055 (the Florida Attorney General’s ability to request records held by the Florida Department  
24 of Health); Fla. Stat. § 409.9072 (the Florida Agency for Health Care Administration’s provision of  
25 Medicaid-related documents to the Florida Attorney General). Second, the Florida statutes here do  
26 not specifically restrict or prohibit the Florida Attorney General’s access to agency records for  
27 discovery purposes – rather, as noted they provide mechanisms for the Florida Attorney General to  
28 request and gain access to specific documents from those two state agencies in certain

1 circumstances. The general statutory responsibility of Florida agencies to manage their own records  
2 does not negate the Florida Attorney General’s role as counsel for those agencies, which inherently  
3 involves obtaining necessary documents for effective representation in litigation. Therefore,  
4 because these statutes do not prohibit the Florida Attorney General’s access to the state agencies’  
5 materials relevant in this matter for discovery, the Court finds that the Florida Attorney General has  
6 a legal right to access and thus control of the relevant records of the agencies listed by Meta.

7 In addition, there is no citation to any statutory or legal prohibition on the Florida Attorney  
8 General’s representing the state agencies in this matter for purposes of discovery. The Court  
9 recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the  
10 attorney general, is both a party to the case while also acting as counsel for a third party. However,  
11 this would not be the first time that a legal services provider, as counsel for a party, is found to have  
12 control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649,  
13 at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this  
14 court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34  
15 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive  
16 materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court  
17 has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s  
18 possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be  
19 a finding of a legal right of access to and thus control over third party client documents in every  
20 case involving a legal services provider as a party; rather, under the particular facts here, and under  
21 the totality of circumstances viewed in light of applicable legal standards, the Court finds that  
22 control exists here.

23 The Florida Attorney General’s role as counsel for the agencies at issue inherently involves  
24 obtaining necessary documents for effective representation in litigation. In acting as counsel, the  
25 Florida Attorney General would necessarily have access to and thus control over the relevant  
26 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6  
27 (finding state Attorney General has control over agency documents “based on his broad statutory  
28 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal

right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Florida Attorney General argues that the state agencies are “independent” of the Florida Attorney General, are “not under the supervision nor control” of the Florida Attorney General, and that under the Florida Constitution the Attorney General is an “independent, elected official,” *see* *dkt. 738-7* at 2, these arguments misapprehend the “legal control” test for documents – the issue is not simply whether the two entities are legally separate (such as two different and separately incorporated entities or legally established entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that “[n]one of them [the state agencies] are related to” the Florida Attorney General and that they “operate outside of the Florida [Attorney General Office’s] authority,” is merely a restatement of the issue and not determinative of the issue. [*Dkt. 738-7* at 2]. Arguing that the “decision to pursue this enforcement action was at the discretion of the Florida [Attorney General Office] and made independently of the state agencies,” confuses and conflates the “legal control” issue for discovery with “operational control” or “daily functional independence” and thus constitutes a legally erroneous argument. *Id.*

Indeed, at least one other federal court has previously found that the Florida Attorney General has control over Florida state agency materials under Fed. R. Civ. P. 34 and “they are

1 therefore subject to party discovery.” *Freyre v. Hillsborough Cnty. Sheriff’s Off.*, No.  
2 813CV02873T27TBM, 2016 WL 1029512, at \*2 (M.D. Fla. Mar. 9, 2016), *vacated*, No.  
3 813CV02873T27TBM, 2016 WL 4502463 (M.D. Fla. July 6, 2016) (citations omitted) (The Court  
4 later vacated the order as a part of the parties’ settlement. *Freyre*, 2016 WL 4502463, at \*1).

5 The Florida Attorney General argues that the *Freyre* was vacated and thus should be  
6 disregarded. [Dkt. 738-7 at 2]. The *Freyre* opinion is not binding precedent, and the fact that *Freyre*  
7 was vacated in connection with a settlement impacts the rights of the parties to that case. But nothing  
8 in the vacatur of that opinion requires this Court to blind itself to whatever persuasive effect flows  
9 from that Florida Federal Court’s analysis. While this Court reaches its own independent  
10 conclusions consistent with the applicable legal standards discussed above, the analysis by the  
11 Florida Federal Court is certainly consistent with (and to that extent further supports) the analysis  
12 here with regard to the Florida Attorney General having control with regard to documents of the  
13 state agencies at issue.

14 Finally, the Court has recognized that the issue of control of state agency documents, when  
15 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-  
16 District Litigation involving most of the same States and State Attorneys General as are involved in  
17 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*  
18 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States  
19 which withdrew their objections to party discovery and negotiated a resolution of this issue with the  
20 opposing party there. *Id.* at 356 n.5. In that case, Florida is identified as one of the States which  
21 reached agreement on the state agency control issue without requiring that court to expend resources  
22 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the  
23 control issue against all the remaining objecting states and given that Florida was able to reach a  
24 negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that  
25 the Florida Attorney General and Meta here were unable to reach a negotiated resolution of this  
26 dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management  
27 Conferences, they should make every effort to work out discovery disputes through reasonable,  
28 good faith negotiations between able and experienced counsel, particularly where, as here, there is



guidance in precedent on the discovery issue at hand.

## VII. GEORGIA

In opposition to the control issue, the Georgia Attorney General argues primarily the following factors: (1) the Georgia Attorney General must utilize public channels to compel an agency to produce document; (2) the Georgia Attorney General is a separate entity and independent from the Georgia agencies; and (3) the Georgia Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-8 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues based primarily on the following factors: (1) Georgia agencies are proscriptively barred from obtaining counsel other than the Georgia Attorney General, with limited exceptions; and (2) the Georgia Attorney General's purported required use of public channels to compel an agency to produce documents is limited for circumstance which require the records be produced for public inspection. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Board of Regents; Department of Behavioral Health and Developmental Disabilities; Department of Economic Development; Department of Education; Department of Family and Children Services; Department of Human Services; Department of Public Health; Governor's Office; and Office of the Child Advocate. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Georgia Attorney General does have legal control, for purposes of discovery, over the listed Georgia agencies. While the Georgia Attorney General is a separate entity and while the Georgia Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the Georgia Attorney General must statutorily act as the Georgia agencies' counsel.

Under Georgia's statutory scheme, the Georgia Attorney General has the duty to "represent the state in all civil actions tried in any court[.]" Ga. Code § 45-15-3(6). Additionally, the Georgia Attorney General's department "is vested with complete and exclusive authority and jurisdiction in all matters of law relating to the executive branch of the government and every department, office, institution, commission, committee, board, and other agency thereof. Every department, office,

institution, commission, committee, board, and other agency of the state government is prohibited from employing counsel in any manner whatsoever unless otherwise specifically authorized by law.” Ga. Code § 45-15-34.

Indeed, the Georgia Attorney General confirmed that its office could represent all of the Georgia agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 9–10]. The Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Georgia Department of Behavioral Health and Developmental Disabilities and the Georgia Department of Education. [Dkt. 1031-4 at 17-101]. Neither of these state agencies are allowed to employ legal counsel other than the Georgia Attorney General absent circumstances not at issue here. Ga. Code §§ 45-15-3, -14, -34. Accordingly, it appears that under the statutory scheme each will be represented by the Georgia Attorney General in this matter for discovery. Thus, because the Georgia Attorney General appears likely to be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Further, the Georgia Attorney General has taken the position that communications between the Georgia Attorney General and these state agencies would be covered by the attorney-client privilege, and that communications between the specific prosecution team in this case and the state agencies would be covered by the work product doctrine (but apparently not the attorney-client privilege). [Dkt. 738-8 at 2]. To the extent the Georgia Attorney General has attempted to subdivide its own office between the prosecution team in this case and other divisions of the state Attorney General in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts of the state Attorney General’s office but not other sub-teams (such as the Consumer Protection Division which is the prosecuting team for this action), that argument is not supported by citation to law and is contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel.*

*Peters*, 951 P.2d at 930 (“When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. This principle, known as the ‘rule of imputed disqualification,’ . . . requires disqualification of all members of a law firm when any one of them practicing alone would be disqualified because of a conflict of interest . . . . The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office or the office of the state public defender.”); accord *City of Cnty. of Denver*, 37 P.3d at 457; see also *Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); cf. also *Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); cf. also *Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that no courts support the Georgia Attorney General’s argument that different individual lawyers in the Georgia Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Georgia Attorney General’s attempt to simultaneously disclaim the

1 existence of an attorney-client privilege as between the “team” of attorneys currently working on  
2 this case, while apparently attempting to preserve the ability to assert that the privilege applies to  
3 communications between other lawyers in the Georgia Attorney General’s Office and these  
4 agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these  
5 legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue  
6 that on one hand the [State] Attorney General represents these individuals, but that for discovery  
7 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,  
8 2014 WL 1796661, at \*2. To the extent the Georgia Attorney General is asserting that the attorney-  
9 client privilege applies to communications between the Georgia Attorney General’s office and the  
10 agencies at issue, that further supports the conclusion of control here. Assertion of the attorney-  
11 client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*,  
12 610 F.3d at 1156.

13 Further, there is no statutory, legal, or administrative rule cited which prohibits the Georgia  
14 Attorney General from accessing the relevant documents of any of the state agencies at issue. The  
15 Georgia Attorney General’s argument that the Georgia Attorney General must use public channels  
16 to obtain documents from state agencies is not a credible interpretation of the statute relied upon –  
17 there is no citation that a public records request is the only way for the Georgia Attorney General to  
18 get documents from state agencies. [Dkt. 738-8 at 2]. If the Georgia Attorney General were correct,  
19 then the Georgia Attorney General would have to submit an Open Records Act request even when  
20 representing a state agency, to get documents from its own client – which is not merely impractical  
21 but also contrary to the principles of effective legal representation. As counsel, the Georgia Attorney  
22 General will have the normal type of direct access to the necessary documents from its own clients,  
23 without resorting to public channels, ensuring efficient and comprehensive legal support for the  
24 agencies involved. The Georgia Open Records Act is not an impediment to that access, because  
25 that Act only applies to records which are to be produced for public inspection (and not for purposes  
26 of litigation such as this case in which there is a Protective Order limiting public availability of  
27 confidential documents). *Bowers v. Bd. of Regents of the Univ. Sys. of Georgia*, 378 S.E.2d 460,  
28 460 (Ga. 1989). Further, there is no citation to any statutory or legal prohibition on the Georgia

1 Attorney General’s representing the state agencies in this matter for purposes of discovery. The  
2 Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization,  
3 the attorney general, is both a party to the case while also acting as counsel for a third party.  
4 However, this would not be the first time that a legal services provider, as counsel for a party, is  
5 found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018  
6 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and  
7 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . .  
8 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as  
9 to responsive materials over which Salas and his law firm had possession, custody or control.”).  
10 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over  
11 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding  
12 broadly that there must be a finding of a legal right of access to and thus control over third party  
13 client documents in every case involving a legal services provider as a party; rather, under the  
14 particular facts here, and under the totality of circumstances viewed in light of applicable legal  
15 standards, the Court finds that control exists here.

16 The Georgia Attorney General’s role as counsel for the agencies at issue inherently involves  
17 obtaining necessary documents for effective representation in litigation. In acting as counsel, the  
18 Georgia Attorney General would necessarily have access to and thus control over the relevant  
19 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6  
20 (finding state Attorney General has control over agency documents “based on his broad statutory  
21 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal  
22 right to obtain responsive documents from the state agencies referenced in the Complaint”). To the  
23 extent the Georgia Attorney General argues that “various constitutionally created state officials  
24 whom Georgia residents separately elect and endow with distinct responsibilities” and that the  
25 Georgia Attorney General and the head of the Department of Education “are constitutional officers  
26 and separately elected in statewide elections,” *see* dkt. 738-8 at 2, these arguments misapprehend  
27 the “legal control” test for documents – the issue is not simply whether one entity (or the head of an  
28 entity) is under the day-to-day operational control of the other (such as a parent-wholly-owned-

1 subsidiary relationship), and not simply whether the two entities are legally separate (such as two  
2 different and separately incorporated entities or legally established corporations), but rather whether  
3 there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for  
4 Rule 34 purposes does not require the party to have actual managerial power over the foreign  
5 corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*,  
6 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and  
7 the state agencies (a relationship mandated by state law) necessitates close coordination. While  
8 operational control may be a factual situation which demonstrates a legal right to obtain the  
9 documents, the absence of such “executive or functional control” is not determinative for evaluating  
10 “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises  
11 when there are two legally distinct or separate entities – otherwise, if only one entity were involved,  
12 there would be no dispute that party discovery covered that one entity. As discussed above, courts  
13 have found “control” for purposes of discovery where a party is clearly not in managerial control  
14 over the third-party, such as a subsidiary having control over the documents of a parent corporation,  
15 or an individual government officer having control over the documents of an entire agency. Thus,  
16 arguing that these “elected officials – including the [Georgia] Governor and the [Georgia Attorney  
17 General] – can have different interests and litigate against each other,” is merely a restatement of  
18 the issue that there are two entities involved here and not determinative of that issue. *Id.* Arguing  
19 that “the [Georgia Attorney General] alone brought this action . . . outside the scope of any agency  
20 representation or direction from the [Georgia] Governor,” confuses and conflates the “legal control”  
21 issue for discovery with “operational control” or “daily functional independence” and thus  
22 constitutes a legally erroneous argument. *Id.*

### 23 **VIII. HAWAII**

24 In opposition to the control issue, the Hawai’i Attorney General argues primarily the  
25 following factors: (1) the Hawai’i Attorney General is a separate entity and independent from the  
26 Hawai’i agencies; and (2) the Hawai’i Attorney General brought the lawsuit under its own  
27 independent law enforcement capacity. [Dkt. 738-9 at 2].

28 In support of a finding of control with regard to these state agencies’ documents, Meta argues



1 based primarily on the following factors: (1) the Hawai'i Attorney General must act as counsel for  
2 the Hawai'i agencies; and (2) Hawai'i has already confirmed that it will represent each of the  
3 identified agencies in responding to a Meta subpoena. *Id.* at 3. Here, Meta seeks discovery from  
4 the following agencies: Department of Budget and Finance; Department of Business, Economic  
5 Development and Tourism; Department of Commerce and Consumer Affairs; Department of  
6 Education; Department of Health; Department of Human Services; Governor; and State Council on  
7 Mental Health. *Id.*

8 After considering the factors argued in the briefs, the Court finds that the factors weigh in  
9 favor of a finding that the Hawai'i Attorney General does have legal control, for purposes of  
10 discovery, over the Hawai'i agencies in dispute. While the Hawai'i Attorney General is a separate  
11 entity and while the Hawai'i Attorney General does bring the instant action in its own independent  
12 authority, this does not outweigh the requirement that the Hawai'i Attorney General must statutorily  
13 act as the Hawai'i agencies' counsel.

14 Under Hawai'i's statutory scheme, the Hawai'i Attorney General "shall administer and  
15 render state legal services, including furnishing of written legal opinions to the governor, legislature,  
16 and such state departments and officers as the governor may direct; represent the State in all civil  
17 actions in which the State is a party[.]" Haw. Rev. Stat. § 26-7. Additionally, the Hawai'i Attorney  
18 General shall "at all times when called upon, give advice and counsel to the heads of departments,  
19 district judges, and other public officers, in all matters connected with their public duties, and  
20 otherwise aid and assist them in every way requisite to enable them to perform their duties  
21 faithfully." Haw. Rev. Stat. § 28-4.

22 Indeed, the Hawai'i Attorney General confirmed that its office could represent all of the  
23 Hawai'i agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt.  
24 738-1 at 9–10]. Indeed, the Hawai'i Attorney General will act as counsel for the Hawai'i agencies  
25 if the agencies receive a subpoena from Meta. [Dkt. 738-1 at 10–11]. Accordingly, it appears that  
26 under the statutory scheme each will be represented by the Hawai'i Attorney General in this matter  
27 for discovery, whether because of any future subpoenas or because the Court finds control for  
28 purposes of discovery. *See id.* Thus, because the Hawai'i Attorney General appears likely to be

involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Hawai'i Attorney General has taken the position that all communications between any division of the Hawai'i Attorney General and these state agencies would be covered by the attorney-client privilege. [Dkt. 738-9 at 2]. "[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45." *Perez*, 2014 WL 1796661, at \*2. The fact that the Hawai'i Attorney General is asserting the attorney-client privilege applies to communications between the Hawai'i Attorney General's office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Hawai'i Attorney General from accessing the relevant documents of any of the state agencies at issue. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control."). Indeed, one court has noted that "[i]n general, an attorney is presumed to have control over documents in its client's possession." *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal

standards, the Court finds that control exists here.

The Hawai'i Attorney General's role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the Hawai'i Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Hawai'i Attorney General argues that these agencies are “independent” from the state Attorney General and are not supervised by the state Attorney General, *see* dkt. 738-9 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that “the agencies identified by Meta are distinct entities under Hawai'i law. [The Hawai'i Attorney General] is one of a

1 maximum of twenty principal departments within the Executive Branch” is simply re-stating the  
2 issue, and not determinative of the issue. [Dkt. 738-9 at 2]. The Hawai’i Attorney General’s  
3 argument that: “Each department is headed by a separate executive, and subject to the supervision  
4 of the governor” erroneously conflates the “legal control” issue with “operational control” or  
5 “functional independence” of the head of each entity. *Id.*

6 Further, the Hawai’i Attorney General’s citation to and reliance on *Lobisch v. United States*,  
7 No. CV 20-00370 HG-KJM, 2021 WL 6497240 (D. Hawaii Aug. 19, 2021), is unavailing. In  
8 *Lobisch*, the Plaintiff sued the United States Government and sought party discovery from every  
9 agency of the United States Government, including any branch of the military and any federal  
10 employee. *Id.* at \*1. There, the Party seeking discovery made no showing of control and simply  
11 argued based on the plain language of Fed. R. Civ. P. 34. *Id.* at 1–2. The *Lobisch* Court rejected  
12 that Plaintiff’s arguments as contrary to the mandates of Fed. R. Civ. P. 1 as well as contrary to the  
13 Federal Torts Claim Act (the substantive law underlying the lawsuit). *Id.* at 2. Because there was  
14 no attempt to show control in *Lobisch*, that opinion never discusses the issue and never analyzes the  
15 issue under *Citric Acid*. Accordingly, the *Lobisch* decision is not determinative or even germane to  
16 the issue here. Unlike in *Lobisch*, here there has been extensive argument over and (as detailed in  
17 this Order) extensive analysis of the control issue under the facts presented.

18 Finally, the Court has recognized that the issue of control of state agency documents, when  
19 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-  
20 District Litigation involving most of the same States and State Attorneys General as are involved in  
21 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*  
22 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States  
23 which withdrew their objections to party discovery and negotiated a resolution of this issue with the  
24 opposing party there. *Id.* at 356 n.5. In that case, Hawai’i is identified as one of the States which  
25 reached agreement on the state agency control issue without requiring that court to expend resources  
26 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the  
27 control issue against all the remaining objecting states and given that Hawai’i was able to reach a  
28 negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that

the Hawai'i Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

## IX. IDAHO

In opposition to the control issue, the Idaho Attorney General argues primarily the following factors: (1) the Idaho Attorney General is a separate entity and independent from the Idaho agencies; (2) the Idaho Attorney General may demand records from other agencies; however, it may only do so pursuant to statute; and (3) the Idaho Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-10 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that Idaho agencies are proscriptively barred from obtaining counsel other than the Idaho Attorney General, with limited exceptions. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Commerce Department; Education Board; Education Department; Governor's Office; and Health and Welfare Department. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Idaho Attorney General does not have legal control, for purposes of discovery, over the Idaho agencies in dispute. While the Idaho Attorney General must act as the legal counsel for the Idaho agencies, this requirement does not override the statutory limitation that the Attorney General may only demand documents from these agencies if explicitly permitted by statute. Since the present lawsuit was initiated under the Idaho Attorney General's independent law enforcement capacity and no relevant statute grants the Idaho Attorney General authority to demand documents from the Idaho agencies in question, the Court concludes that the Idaho Attorney General does not have legal control, for the purposes of discovery, over the Idaho agencies in dispute.

Under Idaho's statutory scheme, the Idaho Attorney General shall "perform all legal services for the state and to represent the state and all departments, agencies, offices, officers, boards, commissions, institutions and other state entities in all courts and before all administrative tribunals

1 or bodies of any nature.” Idaho Code § 67-1401(1). Additionally, the Idaho Attorney General is  
2 required to “advise all departments, agencies, offices, officers, boards, commissions, institutions  
3 and other state entities in all matters involving questions of law.” Idaho Code § 67-1401(2).  
4 Furthermore, “no department, agency, office, officers, board, commission, institution or other state  
5 entity shall be represented by or obtain its legal advice from an attorney at law other than the attorney  
6 general,” with certain exceptions. Idaho Code § 67-1406. One such exception potentially relevant  
7 includes “colleges and universities” which “may employ private counsel to advise them and  
8 represent them before courts of the *state of Idaho*.” Idaho Code § 67-1406(2). However, the instant  
9 matter is not before the State of Idaho.

10 Further, the Court notes that the State Attorneys General have filed an Administrative  
11 Motion to file supplemental information that Meta has recently served an intent to issue subpoenas  
12 to various state agencies. *See* Dkt. 1031-5. None of these state agencies are allowed to employ  
13 legal counsel other than the Idaho Attorney General and thus by statute each must be represented  
14 by the Idaho Attorney General in this matter for discovery. This arrangement indicates strongly that  
15 the state Attorney General, in fulfilling its role as chief legal advisor, would necessarily and  
16 inherently have access to and control over the necessary documents for effective legal representation  
17 of these state agencies. Therefore, the Court concludes that the Idaho Attorney General has legal  
18 control, for the purposes of discovery, over the documents held by the Idaho agencies listed by Meta,  
19 including in particular the three agencies recently listed in the intent to issue subpoenas.

20 Finally, the Court has recognized that the issue of control of state agency documents, when  
21 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-  
22 District Litigation involving most of the same States and State Attorneys General as are involved in  
23 this case. *See Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic*  
24 *Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified  
25 numerous States which withdrew their objections to party discovery and negotiated a resolution of  
26 this issue with the opposing party there. *Id.* at 356 n.5. In that case, Idaho is identified as one of  
27 the States which reached agreement on the state agency control issue without requiring that court to  
28 expend resources resolving the dispute there. *Id.* Given that Idaho was able to reach a negotiated



1 resolution of the control dispute in that Multi-District Litigation, this Court is disappointed that Meta  
2 and Idaho were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly  
3 encouraged the Parties at multiple Discovery Management Conferences, they should make every  
4 effort to work out discovery disputes through reasonable, good faith negotiations between able and  
5 experienced counsel, particularly where, as here, there is guidance in precedent on the discovery  
6 issue at hand.

7 **X. ILLINOIS**

8 In opposition to the control issue, the Illinois Attorney General argues primarily the  
9 following factors: (1) the Illinois Attorney General is a separate entity and independent from the  
10 Illinois agencies; and (2) the Illinois Attorney General brought the lawsuit under its own  
11 independent law enforcement capacity. [Dkt. 738-11 at 2].

12 In support of a finding of control with regard to these state agencies' documents, Meta argues  
13 primarily that the Illinois Attorney General is required to represent Illinois agencies, pursuant to the  
14 Illinois Constitution. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Board of  
15 Education; Board of Higher Education; Department of Children and Family Services; Department  
16 of Commerce and Economic Opportunity; Department of Human Services; Department of Public  
17 Health; and Office of the Governor. *Id.*

18 After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of  
19 a finding that the Illinois Attorney General does have legal control, for purposes of discovery, over  
20 the Illinois agencies in dispute. While the Illinois Attorney General is a separate entity and while  
21 the Illinois Attorney General does bring the instant action in its own independent authority, this does  
22 not outweigh the requirement that the Illinois Attorney General is "the legal officer of the State."  
23 Ill. Const. Art. V, § 15. The Illinois Constitution has been interpreted to require that the Illinois  
24 Attorney General represent state agencies. *People ex rel. Sklodowski v. State*, 642 N.E.2d 1180,  
25 1184 (Ill. 1994), *as modified on denial of reh'g* (Nov. 15, 1994). Indeed, the Illinois Attorney  
26 General admits that "the [Illinois Attorney General] has broad statutory and common law powers to  
27 conduct litigation on behalf of State agencies[.]" [Dkt. 738-11 at 2].

28 Indeed, the Illinois Attorney General confirmed that its office could represent all of the

1 Illinois agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt.  
2 738-1 at 11–12]. Accordingly, it appears that under the Illinois Constitutional scheme each will  
3 likely be represented by the Illinois Attorney General in this matter for discovery, whether because  
4 of any future subpoenas or because the Court finds control for purposes of discovery. *See Env’t*  
5 *Prot. Agency v. Pollution Control Bd.*, 372 N.E.2d 50, 51 (Ill. 1977). Thus, because the Illinois  
6 Attorney General appears likely to be involved in representing these state agencies in any event in  
7 this case, whether to respond to subpoenas or to respond to party discovery.

8 Relatedly, the Illinois Attorney General has taken the position that any past or future  
9 communications between any the Illinois Attorney General and these state agencies, if they are  
10 responsive to Meta’s discovery requests, would be covered by the attorney-client privilege. [Dkt.  
11 738-11 at 2]. Indeed, the Illinois Attorney General admits that “attorney-client relationship exists  
12 between a State agency and the Attorney General.” *Id.* (quoting *Env’t Prot. Agency*, 372 N.E.2d at  
13 52). “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it  
14 does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one  
15 hand the [State] Attorney General represents these individuals, but that for discovery purposes the  
16 [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL  
17 1796661, at \*2. The fact that the Illinois Attorney General is asserting the attorney-client privilege  
18 applies to communications between the Illinois Attorney General’s office and the agencies at issue  
19 (and admitting that an attorney-client relationship exists, even as to past communications relevant  
20 to discovery in this case) further supports the conclusion of control here.

21 Further, there is no statutory, legal, or administrative rule cited which prohibits the Illinois  
22 Attorney General from accessing the relevant documents of any of the state agencies at issue. The  
23 Illinois Attorney General cites two statutes which allegedly restrict state agencies from providing  
24 “certain types of information to anyone, even other agencies.” Dkt. 738-11 at 2 (citing 20 Ill. Comp.  
25 Stat. 2305/2.1(c); 410 Ill. Comp. Stat. 305/9(2)). Those two statutes are not applicable to scope of  
26 discovery in this action: Section 2.1(c) relates to “[s]haring of information on reportable illnesses,  
27 health conditions, unusual disease or symptom clusters, or suspicious events between and among  
28 public health and law enforcement authorities[,]” and Section 9(2) relates to the confidentiality of

1 “[a]ll information and records held by a State agency, local health authority, or health oversight  
2 agency pertaining to HIV-related information[.]” The Illinois Legislature knew how to specify  
3 restricting sharing of information between agencies and the Illinois Attorney General in these two  
4 specific instances, but failed to do so more generally for discovery (unlike, for example, the  
5 Delaware Legislature as discussed above), and this lack of a general prohibition supports a finding  
6 of control.

7 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement  
8 organization, the attorney general, is both a party to the case while also acting as counsel for a third  
9 party. However, this would not be the first time that a legal services provider, as counsel for a party,  
10 is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*,  
11 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and  
12 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . .  
13 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as  
14 to responsive materials over which Salas and his law firm had possession, custody or control.”).  
15 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over  
16 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding  
17 broadly that there must be a finding of a legal right of access to and thus control over third party  
18 client documents in every case involving a legal services provider as a party; rather, under the  
19 particular facts here, and under the totality of circumstances viewed in light of applicable legal  
20 standards, the Court finds that control exists here.

21 The Illinois Attorney General’s role as counsel for the agencies at issue inherently involves  
22 obtaining necessary documents for effective representation in litigation. In acting as counsel, the  
23 Illinois Attorney General would necessarily have access to and thus control over the relevant  
24 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6  
25 (finding state Attorney General has control over agency documents “based on his broad statutory  
26 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal  
27 right to obtain responsive documents from the state agencies referenced in the Complaint”). To the  
28 extent the Illinois Attorney General argues that the Illinois Attorney General and the Illinois

Governor “are independently elected by the State’s voters; they serve in different roles, enjoy unique rights and responsibilities, and have control over separate governmental functions,” *see* dkt. 738-11 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that “there is no law that gives the [Illinois Attorney General] control over their [the agencies’] executive functions” is simply re-stating the issue to be decided, and not determinative of the issue. *Id.* The Illinois Attorney General’s argument that these are “independent state agencies” erroneously conflates the “legal control” issue with “operational control” or “functional independence” of each entity.

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*

(II) opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, Illinois is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that Illinois was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the Illinois Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

## **XI. INDIANA**

In opposition to the control issue, the Indiana Attorney General argues primarily the following factors: (1) the Indiana Attorney General is a separate entity and independent from the Indiana agencies; (2) certain offices are entitled to employ counsel for litigation purposes without approval from the Indiana Attorney General; (3) the Indiana Attorney General brought the lawsuit under its own independent law enforcement capacity; and (4) the Indiana Attorney General is not seeking damages on behalf of the listed agencies. [Dkt. 738-12 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that Indiana agencies are proscriptively barred from obtaining counsel other than the Indiana Attorney General. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Commission on Improving the Status of Children in Indiana; Department of Child Services; Department of Education; Department of Health; Family and Social Services Administration; Governor; Office of Management and Budget; and State Board of Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Indiana Attorney General does have legal control, for purposes of discovery, over the listed Indiana agencies which are not subject to an exception of mandatory

representation. While the Indiana Attorney General is a separate entity and while the Indiana Attorney General does bring the instant action in its own independent authority and does not seek damages on behalf of the listed agencies, this does not outweigh the requirement that the Indiana Attorney General will act as the agencies’ counsel. The statutory scheme in Indiana requires that “[t]he attorney general shall have charge of and direct the prosecution of all civil actions that are brought in the name of the state of Indiana or any state agency.” Ind. Code § 4-6-3-2(a). “The [Indiana] Attorney General’s authority to represent the State, *its agencies* and officers is nearly exclusive, and agencies may not employ any attorney without the written consent of the Attorney General.” *Indiana State Highway Comm’n v. Morris*, 528 N.E.2d 468, 474 (Ind. 1988) (emphasis added).

Importantly, the Indiana Attorney General’s arguments do not negate the fact that all of the Indiana agencies at issue here are barred by Indiana law from obtaining counsel other than the Indiana Attorney General: “No agency . . . shall have any right to name, appoint, employ, or hire any attorney or special or general counsel to represent it or perform any legal service in behalf of the agency and the state without the written consent of the attorney general.” Ind. Code § 4-6-5-3(a). Further, the Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Commission on Improving the Status of Children in Indiana, the Indiana Department of Education, and the Indiana Department of Health. [Dkt. 1031-5 at 227–352]. None of these state agencies are allowed to employ legal counsel other than the Indiana Attorney General absent consent (and there is no indication of any such consent in the record) and thus by statute each must be represented by the Indiana Attorney General in this matter for discovery. *See* Ind. Code §§ 4-6-5-1, -2 (the Indiana Attorney General “shall have the sole right and power” to assign an attorney “to any agency of the state of Indiana to perform in behalf of such agency”). This arrangement indicates strongly that the Indiana Attorney General, in fulfilling its statutory role to as “nearly exclusive” legal representative of state agencies, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies. Therefore, the Court concludes that the Indiana Attorney General has legal control, for



the purposes of discovery, over the documents held by the Indiana agencies listed by Meta, including in particular the three agencies recently listed in the intent to issue subpoenas.

Relatedly, the Indiana Attorney General has taken the position that communications between the Indiana Attorney General and these state agencies would be covered by the attorney-client privilege if such communications are encompassed within the scope of discovery sought by Meta. [Dkt. 738-12 at 2]. Indeed, the Indiana Attorney General admits that “Indiana law has long cemented the idea that ‘[t]he relationship of attorney and client clearly applies to the [Indiana] Attorney General and the state agencies he represents, and the attorney-client privilege should protect communications exchanged in that relationship.’” *Id.* “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. The fact that the Indiana Attorney General is asserting the attorney-client privilege applies to communications between the Indiana Attorney General’s office and the agencies at issue even as to past communications within the scope of relevant discovery in this case further supports the conclusion of control here.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Indiana Attorney General from accessing the documents of the state agencies at issue. The Indiana Attorney General argues control is somehow lacking because Indiana law contemplates that the Indiana Attorney General can issue civil investigative demands to state agencies. Dkt. 738-12 at 2 (citing Ind. Code §§ 4-6-3-1, -3 (regarding issuance of civil investigative demands to state agencies)). As Meta argues, however, the fact that there exists a statutory right for the Indiana Attorney General demonstrates that the Indiana Legislature expressly intended there to be a formal mechanism for sharing of documents between state agencies and the Indiana Attorney General. [Dkt. 738 at 3]. There is nothing in this statutory scheme which indicates that the procedure for issuing civil investigative demands to agencies is the exclusive manner by which the Indiana Attorney General can obtain documents from state agencies, and rather than implying that the statute prohibits or denigrates from a legal right to obtain documents from state agencies, the statutory scheme here

indicates support for (and a legal mechanism for) information sharing between Indiana agencies and the Indiana Attorney General.

The Indiana Attorney General does not cite to any general statutory or legal prohibition on the Indiana Attorney General’s representing the state agencies in this matter for purposes of discovery. The Indiana Attorney General cites to one entity, the Indiana Economic Development Corporation, which is defined under state law as an “independent instrumentality” and not a state agency, and which has an express statutory right to retain its own legal counsel. Dkt. 738-12 at 2 (citing Ind. Code §§ 5-28-3-2, -5-3). Meta expressly disclaims seeking “party discovery” from the Indiana Economic Development Corporation and expressly commits to “treat the Economic Development Corporation as a non-party for purposes of discovery.” [Dkt. 738-12 at at 3 n.1].

The Indiana Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the Indiana Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Indiana Attorney General argues that the Indiana Attorney General “is a separately elected and statutorily created office” from the Indiana Governor, *see* dkt. 738-12 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual

situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the Indiana Attorney General “does not exert generalized control over the agencies or their documents,” dkt. 738-12 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Indiana Attorney General’s argument that these are “agencies are not subject to management by [the Indiana Attorney General], are not directed by [the Indiana Attorney General],” erroneously conflates the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery. *Id.*

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

1 Finally, the Court has recognized that the issue of control of state agency documents, when  
2 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-  
3 District Litigation involving most of the same States and State Attorneys General as are involved in  
4 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*  
5 (*II*) opinion not only ruled against the objecting States, but also helpfully identified numerous States  
6 which withdrew their objections to party discovery and negotiated a resolution of this issue with the  
7 opposing party there. *Id.* at 356 n.5. In that case, Indiana is identified as one of the States which  
8 reached agreement on the state agency control issue without requiring that court to expend resources  
9 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the  
10 control issue against all the remaining objecting states and given that Indiana was able to reach a  
11 negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that  
12 the Indiana Attorney General and Meta were unable to reach a negotiated resolution of this dispute.  
13 As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences,  
14 they should make every effort to work out discovery disputes through reasonable, good faith  
15 negotiations between able and experienced counsel, particularly where, as here, there is guidance in  
16 precedent on the discovery issue at hand.

## 17 XII. KANSAS

18 In opposition to the control issue, the Kansas Attorney General argues primarily the  
19 following factors: (1) the Kansas Attorney General is a separate entity and independent from the  
20 Kansas agencies; (2) Kansas agencies are statutorily responsible for maintaining, preserving,  
21 retaining, and providing access to its own records; and (3) the Kansas Attorney General brought the  
22 lawsuit under its own independent law enforcement capacity. [Dkt. 738-13 at 2].

23 In support of a finding of control with regard to these state agencies' documents, Meta argues  
24 primarily that the Kansas Attorney General must appear for the state and control the state's  
25 prosecution or defense. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Board of  
26 Regents; Department for Aging and Disability Services; Department for Children and Families;  
27 Department of Administration; Department of Commerce; Department of Education; Department  
28 of Health and Environment; and Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Kansas Attorney General has legal control, for purposes of discovery, over the listed Kansas agencies. First, the statutory scheme in Kansas requires that “[t]he attorney general **shall** appear for the state, and prosecute and defend any and all actions and proceedings, civil or criminal, . . . in all federal courts, in which the state shall be **interested** or a party, and **shall**, when so appearing, control the state’s prosecution or defense.” Kan. Stat. § 75-702(a) (emphasis added). It cannot be seriously disputed that the State of Kansas is interested when one or more of its state agencies are the target of discovery in a federal action. Second, the Kansas Attorney General is the chief legal officer for the state of Kansas. *DeBerry v. Kansas State Bd. of Acct.*, 196 P.3d 958, 958 (Kan. Ct. App. 2008) (“Acting as counsel for the Board, which is the administrative agency in charge of regulating the practice of certified public accountancy in the state of Kansas, is entirely consistent with the attorney general’s role as chief legal officer for the State. Although the legislature has identified various situations in which the attorney general is *required* to provide representation, we find no Kansas law that precludes the attorney general from representing the Board under the particular circumstances presented in this case.”) (emphasis in original). Further, Kansas’s statutory scheme requires that “[t]he attorney general **shall** . . . prosecute or **defend** for the state **all actions**, civil or criminal, relating to any matter **connected with their departments**.” Kan. Stat. § 75-703 (emphasis added).

Importantly, the Kansas Attorney General’s arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the Kansas agencies at issue here to employ or obtain counsel in this matter other than the Attorney General. [Dkt. 738-13 at 2]. Indeed, the Kansas Attorney General confirmed that its office would definitely represent all of the Kansas agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 13]. Accordingly, it appears that under the statutory scheme each agency will be represented by the Kansas Attorney General in this matter for discovery. *See* Kan. Stat. §§ 75-702, -703. Curiously, the Kansas Attorney General takes the position that it would not represent the listed agencies. [Dkt. 738-1 at 13]. However, on the record before the Court, this is an error of law because neither of these agencies are exempt from the express prohibition on retaining different

counsel. Thus, because the Kansas Attorney General will be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Kansas Attorney General has taken the position that communications between the Kansas Attorney General and these state agencies would be covered by the attorney-client privilege if such communications are encompassed within the scope of discovery sought by Meta. [Dkt. 738-13 at 2]. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. Just as the Court in *Perez* rejected the inconsistent approach to privilege there, here the Kansas Attorney General argues that “the Attorney General does not **currently** represent any of the identified agencies” while at the same time arguing that “**if** another state agency requests legal representation or legal advice from the [Kansas] Attorney General’s Office, or receives a discovery request in this litigation, information related to those communications with that agency **are privileged**, under privilege doctrines including attorney-client privilege.” Dkt 738-13 at 2 (emphasis added). The Kansas Attorney General’s attempt to preserve the ability to assert the attorney-client privilege between the Kansas Attorney General’s office and the agencies at issue further supports the conclusion of control here. Here, it is illusory to argue “if” the Kansas Attorney General would represent the state agencies – the Kansas Attorney General has already confirmed that their office will do so for discovery in this matter. [Dkt. 738-1 at 13]. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Kansas Attorney General from accessing the documents of the state agencies at issue for purposes of discovery. The Kansas Attorney General’s argument that the Kansas Attorney General must use either the Kansas Open Records Act, Kan. Stat. § 45-215 *et seq.*, or a subpoena to obtain documents from state agencies who are their client is not a credible interpretation of the Kansas Open Records Act – there is no citation that a public records request is the only way for the Kansas Attorney



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1 General to get documents from state agencies they are representing in litigation. [Dkt. 738-8 at 2].  
2 If the Kansas Attorney General were correct, then the Kansas Attorney General would have to  
3 submit an Open Records Act request even when representing a state agency, to get documents from  
4 its own client – which is not merely impractical and not believable but also contrary to the principles  
5 of effective legal representation. If the Kansas Attorney General’s supposition that, every time the  
6 Kansas Attorney General seeks documents from state agencies, Open Records Act requests would  
7 be routine and necessary, then the logical conclusion is that Open Records Act would be a routinely  
8 used legal right to access those documents and records of the agency subject to the Act. At least  
9 one court has found that a state “public records” Freedom of Information Act constitutes a legal  
10 right to access documents from an agency for purposes of “control” under Rule 34. *See Flagg*, 252  
11 F.R.D. at 355–57 (“Because at least some of the text messages maintained by [(third party)] SkyTel  
12 are ‘public records’ within the meaning of Michigan’s FOIA, it would be problematic, to say the  
13 least, to conclude that the [named defendant] City lacks a legal right to obtain these records as  
14 necessary to discharge its statutory duty of disclosure.”). As counsel, the Kansas Attorney General  
15 will have the normal type of direct access to the necessary documents from its own clients, without  
16 resorting to public channels, ensuring efficient and comprehensive legal support for the agencies  
17 involved. The Kansas Open Records Act is not an impediment to that access, because that Act only  
18 applies to records which are to be produced for public inspection (and not for purposes of litigation  
19 such as this case in which there is a Protective Order limiting public availability of confidential  
20 documents). Kan. Stat. § 45-220(a). Further, the Kansas Open Records Act nowhere states that this  
21 statute is the only means by which the Kansas Attorney General can obtain records from other state  
22 agencies – the statute merely sets up a permissive system for public inspection, not a restriction or  
23 limitation on access. Indeed, the Kansas Attorney General has cited no precedent requiring the  
24 Kansas Attorney General to use either an Open Records Act request or a subpoena to obtain  
25 documents from state agencies represented in litigation by the Kansas Attorney General. The Court  
26 finds this argument to be wholly unpersuasive. Finally, the argument that there is no statute or law  
27 specifically authorizing the Kansas Attorney General “unfettered access to or the right to compel  
28 document production of other agencies’ documents” is legally incorrect. Control, for purposes of

1 Rule 34, does not require showing “unfettered access” to all state agencies’ documents under all  
2 circumstances. *Monsanto*, 2023 WL 4083934, at \*5 (“Despite the State’s characterization of the  
3 issue, we need not decide whether the Illinois Attorney General has “unfettered access to all state  
4 agencies’ records under all circumstances.” Rather, the issue is one of “control” under Rule 34 –  
5 nothing more, nothing less.”). Further, the state Attorney General’s argument implicitly assumes  
6 an overly restrictive view of the control test for documents under Rule 34. To the contrary, courts  
7 have recognized that control for purposes of document discovery is liberally construed. *E.g.*,  
8 *Miniace*, 2006 WL 335389, at \*1; *Evans*, 2010 WL 1136216, at \*1–2; *Inland Concrete Enterprises*,  
9 *Inc.*, 2011 WL 13209239, at \*3–4.

10 Additionally, the Kansas Attorney General does not cite any statutory or legal prohibition  
11 on the Kansas Attorney General’s representing the state agencies in this matter for purposes of  
12 discovery. The Court recognizes that this is a somewhat unusual situation, in which a law  
13 enforcement organization, the attorney general, is both counsel for a party to the case while also  
14 acting or able to act as counsel for a third party. However, this would not be the first time that a  
15 legal services provider, as counsel for a party, is found to have control over third party documents  
16 for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and  
17 his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas  
18 defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida  
19 lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had  
20 possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is  
21 presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at  
22 \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and  
23 thus control over third party client documents in every case involving a legal services provider as a  
24 party; rather, under the particular facts here, and under the totality of circumstances viewed in light  
25 of applicable legal standards, the Court finds that control exists here.

26 The Kansas Attorney General’s role as counsel for the agencies at issue inherently involves  
27 obtaining necessary documents for effective representation in litigation. In acting as counsel, the  
28 Kansas Attorney General would necessarily have access to and thus control over the relevant

documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Kansas Attorney General argues that the Kansas Attorney General “separate and distinct elected entity with separate duties and responsibilities as delineated in the Kansas Constitution and Kansas law,” *see* dkt. 738-13 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the Kansas Attorney General “is not suing on behalf of or representing any state agency in this litigation; rather, he brings this action under independent statutory authority,” dkt. 738-13 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Kansas Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is

insufficient to rebut a finding of legal control of the documents for purposes of discovery.

In opposition, the Kansas Attorney General cites and relies upon *Amex*, 2011 WL 13073683, and *Warner Chilcott Holdings*, 2007 WL 9813287, at \*4–5. [Dkt. 78-13 at 2]. As discussed above (and incorporated herein), the Court finds neither of these cases to be persuasive (and neither is binding). Both cases focus on the issue of executive control and the structure of the executive branch of the local state government, and as discussed above, the Ninth Circuit’s standard for control is not limited to or determined by whether there is “operational control” of one entity by another in day-to-day functions. *Citric Acid*, 191 F.3d at 1107–08 (explaining that control over local unions was not found in *International Union* even though the national union could theoretically dissolve and take over the operations and hence the documents of the local unions).

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, Kansas is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that Kansas was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the Kansas Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

### **XIII. KENTUCKY**

In opposition to the control issue, the Kentucky Attorney General argues primarily the

following factors: (1) the Kentucky Attorney General is a separate entity and independent from the Kentucky agencies; (2) only two agencies, which are not on Meta’s listed agencies, allow the Kentucky Attorney General to have access to material evidence and information; (3) Kentucky agencies have their own staffing and capacity to independently initiate and participate in litigation and retain counsel as they see fit; and (4) the Kentucky Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-14 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues primarily the Kentucky Attorney General must act as chief legal officer tasked with attending to the legal business of Kentucky state agencies. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Board of Education, Cabinet for Health and Family Services, Department for Behavioral Health, Developmental and Intellectual Disabilities, Department for Business Development, Department for Public Health, Department of Education, Finance and Administration Cabinet, Governor, and Office of State Budget Director. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Kentucky Attorney General has legal control, for purposes of discovery, over the listed Kentucky agencies. First, the Kentucky “Attorney General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies[.]” Ky. Rev. Stat. § 15.020(1). Second, the statutory scheme in Kentucky requires that “the Attorney General **shall . . . enter an appearance in all cases**, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, **and attend to all litigation** and legal business in or out of the state required of the office by law, or in which the Commonwealth has an interest, **and any litigation** or legal business that **any** state officer, department, commission, or **agency may have** in connection with, or growing out of, his, her, or **its official duties**[.]” Ky. Rev. Stat. § 15.020(3) (emphasis added).

The Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies. *See* Dkt. 1031-5. Indeed, the Kentucky Attorney General confirmed that its office could

represent all of the state agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 13–14]. Accordingly, it appears that under the statutory scheme each agency will likely be represented by the Kentucky Attorney General in this matter for discovery. *See* Ky. Rev. Stat. § 15.020(1). Thus, because the Kentucky Attorney General will likely be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

The Kentucky Attorney General relies on statutory authority for Kentucky agencies to hire their own counsel to demonstrate that the Kentucky Attorney General may have no role in representing the agencies here and thus would not have control. Dkt. 738-14 at 2 (citing Ky. Rev. Stat. § 12.210). However, the Kentucky Legislature made clear that this statute does not denigrate from Section 15.020 quoted above which requires that the Kentucky Attorney General “shall” appear in any litigation that any agency may have in connection with its official duties. *See* Ky. Rev. Stat. § 12.230 (“KRS 15.020 shall remain in full force and effect, except to the extent the same is in conflict with KRS 12.200 to 12.220[.]”). Further, the Kentucky statutory scheme continues to recognize that “[t]he [Kentucky] Governor or any department *may require the advice or services* of the Attorney General and the assistant attorneys general in matters relating to the duties or functions of *any such office or department.*” *Id.* (emphasis added).

Further, there is no statutory, legal, or administrative rule cited which prohibits the Kentucky Attorney General from accessing the documents of the state agencies at issue for purposes of discovery. To the contrary, the Kentucky Attorney General admits that state law requires that “[a]ll departments, agencies, officers, and employees *of the Commonwealth shall fully cooperate with the [Kentucky] Attorney General* in carrying out the functions of [Kentucky consumer protection laws].” Ky. Rev. Stat. § 367.160(1) (emphasis added). This statutory requirement affords the Kentucky Attorney General the legal right to obtain documents from state agencies when enforcing state consumer protection laws, thus satisfying the *Citric Acid* test for control here.

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both counsel for a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services



provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The Kentucky Attorney General’s likely role as counsel for the agencies at issue would inherently involve obtaining necessary documents for effective representation in litigation. In acting as counsel, the Kentucky Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Kentucky Attorney General argues that the “Kentucky agencies at issue . . . are distinct and separate entities,” *see* dkt. 738-14 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law)

necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. *See, e.g., Sublett v. Henson*, No. 5:16-CV-00184-TBR, 2018 WL 3939333, at \*3–6 (W.D. Ky. Aug. 16, 2018) (rejecting objections of named defendants, officers and officials of state prison, to document requests, and finding warden has control over documents of the Kentucky Department of Corrections). Thus, arguing that “[t]he Kentucky Attorney General and [Kentucky] Governor are separately elected constitutional officers of the Commonwealth . . . [and] the other agencies named by Meta are headed by individuals appointed by the Governor,” dkt. 738-14 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Kentucky Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

In opposition, the Kentucky Attorney General cites several cases in which the Kentucky Attorney General has been “in direct legal conflict with these agencies.” [Dkt. 738-14 at 2 n.1]. This argument is merely another way of restating the “operational independence” argument rejected argument above. The fact that, in other cases involving different issues, the Kentucky Attorney General has been adverse to state agencies is not determinative of whether there is control for purposes of the documents sought in discovery in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 356–57. Just as a joint defense group in a multi-defendant litigation may include companies which, in other venues, are adverse litigants, the law understands that entities may be adverse in one forum and still yet may have aligned legal interests in another.

Finally, the Court has recognized that the issue of control of state agency documents, when

a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Id.* at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, Kentucky is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that Kentucky was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the Kentucky Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

#### XIV. LOUISIANA

In opposition to the control issue, the Louisiana Attorney General argues primarily the following factors: (1) the Louisiana Attorney General is a separate entity and independent from the Louisiana agencies; and (2) most Louisiana agencies have their own general counsel or contract with outside counsel to handle their other legal needs. [Dkt. 738-15 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that the Louisiana Attorney General acts as the chief legal officer of the state and is required by statute to represent state agencies in all litigation involving tort claims. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Children and Family Services, Department of Education, Department of Health, Department of Economic Development, Office of Planning and Budget, and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Louisiana Attorney General does have legal control, for purposes of

discovery, over the listed Louisiana agencies which are not subject to an exception of mandatory representation. While the Louisiana Attorney General is a separate entity and while the Louisiana Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the Louisiana Attorney General will act as the agencies’ counsel. The statutory scheme in Louisiana requires that “[t]he attorney general **shall** represent the state and **all departments and agencies** of state government in **all litigation** arising out of or involving **tort**[.]” La. Stat. § 49:257(A) (emphasis added). “[C]onsumer protection claims sound in tort[.]” *Zodiac 21, Inc. v. Oyo Hotels, Inc.*, No. CV 20-63-SDD-RLB, 2020 WL 6479160, at \*6 n.56 (M.D. La. Nov. 3, 2020) (analyzing claim under Louisiana Unfair Trade Practice and Consumer Law); *accord Kreger v. Gen. Steel Corp.*, No. CIV.A. 07-575, 2010 WL 2902773, at \*12 (E.D. La. July 19, 2010) (“class members’ consumer protection claims . . . sound in tort). Indeed, the Louisiana Attorney General admits here that “the Louisiana Attorney General does represent state agencies in specific circumstances, such as litigation arising out of or involving tort[.]” [Dkt. 738-15 at 2].

Further, the Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Louisiana Department of Education and the Louisiana Department of Health. [Dkt. 1031-5 at 1070–1153]. The Louisiana Attorney General is required by statute to represent each of these agencies in this matter for discovery. *See* La. Stat. § 49:257(A). This arrangement indicates strongly that the Louisiana Attorney General, in fulfilling its state constitutional role as “chief legal officer of the state,” La. Const. art. IV, § 8, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies. Therefore, the Court concludes that the Louisiana Attorney General has legal control, for the purposes of discovery, over the documents held by the Louisiana agencies listed by Meta, including in particular the agencies recently listed in the intent to issue subpoenas.

The Louisiana Attorney General has taken the position that, because that office “does not represent agencies in this action,” communications between the Louisiana Attorney General and these state agencies “are **generally** not protected under the attorney-client privilege.” Dkt. 738-15 at 2 (emphasis added). The Louisiana Attorney General’s use of the word “generally” reveals the

intention: the Louisiana Attorney General is attempting to preserve the ability to assert the attorney-client privilege later when faced with formal discovery (or this Order). It is illusory to argue the Louisiana Attorney General does not presently represent the state agencies – the Louisiana Attorney General has already confirmed that their office could do so for discovery in this matter. [Dkt. 738-1 at 14–15]. And as discussed above, the Louisiana Legislature requires the Louisiana Attorney General to represent agencies in cases such as this which sound in tort. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. Just as the court in *Perez* rejected the inconsistent approach to privilege there, here the Court rejects the Louisiana Attorney General’s apparent intention to argue now (in opposition to this motion) that “generally” the privilege does not apply, while plainly relying on the word “generally” to preserve the ability to assert the privilege later. The Louisiana Attorney General’s attempt to preserve the ability to assert the attorney-client privilege between the Louisiana Attorney General’s office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Louisiana Attorney General from accessing the documents of the state agencies at issue. [Dkt. 738-15 at 2]. Because the Louisiana Attorney General is required to serve as counsel for the Louisiana agencies in litigation arising out of or involving tort, the Court is not persuaded by the argument that “most state agencies have their own general counsel or contract with outside counsel to handle their *other* legal needs.” *Id.* (emphasis added). The instant case falls outside the scope of “their other legal needs” and therefore such authority by the agencies in “other” areas of law is legally irrelevant here. Similarly, the Louisiana Attorney General does not cite to any general statutory or legal prohibition on the Louisiana Attorney General’s representing the state agencies in this matter for purposes of discovery.

1       The Louisiana Attorney General’s role as counsel for the agencies at issue inherently  
2 involves obtaining necessary documents for effective representation in litigation. In acting as  
3 counsel, the Louisiana Attorney General would necessarily have access to and thus control over the  
4 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at  
5 \*5–6 (finding state Attorney General has control over agency documents “based on his broad  
6 statutory and common law powers to control and manage legal affairs on behalf of state agencies,  
7 has a legal right to obtain responsive documents from the state agencies referenced in the  
8 Complaint”). To the extent the Louisiana Attorney General argues that the Louisiana Attorney  
9 General “is an independently elected constitutional officer” from the Louisiana Governor, *see* dkt.  
10 738-15 at 2, that argument misapprehends the “legal control” test for documents – the issue is not  
11 simply whether one entity is under the day-to-day operational control of the other (such as a parent-  
12 wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate  
13 (such as two different and separately incorporated entities), but rather whether there is a legal right  
14 to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes  
15 does not require the party to have actual managerial power over the foreign corporation, but rather  
16 that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638.  
17 Here, the attorney-client relationship between the state Attorney General and the state agencies (a  
18 relationship mandated by state law) necessitates close coordination. While operational control may  
19 be a factual situation which demonstrates a legal right to obtain the documents, the absence of such  
20 “executive or functional control” is not determinative for evaluating “control” for purposes of  
21 discovery. By definition, the “legal control” issue for discovery arises when there are two legally  
22 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute  
23 that party discovery covered that one entity. As discussed above, courts have found “control” for  
24 purposes of discovery where a party is clearly not in managerial control over the third-party, such  
25 as a subsidiary having control over the documents of a parent corporation, or an individual  
26 government officer having control over the documents of an entire agency. Thus, arguing that the  
27 Louisiana Attorney General “is a separate department under the executive branch,” dkt. 738-15 at  
28 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Louisiana



Attorney General’s argument that these agencies “are legally distinct entities,” erroneously conflates the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

*Id.*

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

## **XV. MAINE**

In opposition to the control issue, the Maine Attorney General argues primarily the following factors: (1) the Maine Attorney General is a separate entity and independent from the Maine agencies; (2) the Maine Attorney General brought the lawsuit under its own independent law enforcement capacity; and (3) that the statutes which require the Maine Attorney General to represent Maine agencies does not afford the Maine Attorney General control or access to the Maine agencies’ documents. [Dkt. 738-16 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) the Maine Attorney General is the chief law officer of the state and that the Maine Attorney General must appear for all Maine agencies in all civil actions

in which the state is a party; (2) Maine agencies are proscriptively barred from obtaining counsel other than the Maine Attorney General without consent from the Maine Attorney General; and (3) the Maine Attorney General has already confirmed that it would represent the identified agencies in responding to a Meta subpoena. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Economic & Community Development, Department of Education, Department of Health & Human Services, Division of Administration, and Governor’s Office. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Maine Attorney General does have legal control, for purposes of discovery, over the Maine agencies in dispute. The Maine Attorney General admits that the Maine Attorney General is “the chief law officer of the State.” Dkt. 738-16 at 2 (quoting *Lund v. Pratt*, 308 A.2d 554, 558 (Me. 1973)). The statutory scheme in Maine requires that “[t]he Attorney General or a deputy, assistant or staff attorney **shall appear** for the State . . . and agencies of the State in **all civil actions** and proceedings in which the State is a party or interested . . . in all the courts of the State and in those actions and proceedings before any other tribunal when requested by the Governor or by the Legislature or either House of the Legislature. All such actions and proceedings **must** be prosecuted or defended by the Attorney General or under the Attorney General’s direction.” Me. Rev. Stat. tit. 5, § 191(3) (emphasis added).

Importantly, the Maine Attorney General’s arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the Maine agencies at issue here to employ or obtain counsel in this matter other than the Attorney General absent consent. [Dkt. 738-13 at 2]. Under Maine’s statutory scheme, “[a]ll **legal services** required by those officers, boards and commissions in matters relating to their official duties **must be rendered by the Attorney General** or under the Attorney General’s direction. The officers or **agencies of the State may not act at the expense of the State as counsel, nor employ private counsel** except upon prior written approval of the Attorney General.” Me. Rev. Stat. tit. 5, § 191(3)(B) (emphasis added). Here, no such consent has been proffered or even predicted.

The Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state

agencies, including the Maine the Maine Department of Education and the Maine Department of Health & Human Services. [Dkt. 1031-4 at 550–633]. Significantly, the Maine Attorney General has confirmed that its office will definitely represent all of the state agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 15]. Accordingly, it appears that under the statutory scheme each agency will be represented by the Maine Attorney General in this matter for discovery. *See* Me. Rev. Stat. tit. 5, § 191(3). Thus, because the Maine Attorney General will likely be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Maine Attorney General from accessing the documents of the state agencies at issue for purposes of discovery. The absence of a general statute that authorizes the Maine Attorney General to access all Maine agencies’ documents does not, by itself, mandate a conclusion that the Maine Attorney General lacks control, for the purposes of discovery, of the documents of the listed Maine agencies. The Maine Attorney General’s argument that the absence of a statute denying “control of agency documents cannot equate to a conclusion that he [the Maine Attorney General] does have such control” misconstrues the legal control test – the absence or existence of a statute is not by itself “equating to a conclusion” or outcome determinative. To the extent a statute exists or is lacking is, however, a factor for the Court to consider, along with the other factors discussed herein.

With regard to statutory authorization to access documents, the situation in Maine is not as simplistic as the Maine Attorney General posits. First, the Maine Attorney General admits that agencies are sometimes expressly required by local law to provide records to the Attorney General. Dkt. 738-16 at 2 (citing Me. Rev. Stat. tit. 9-B, § 226(2)). Indeed, the cited statute requires the Maine Superintendent of Financial Institutions to disclose information upon written request by the Maine Attorney General. *See* Me. Rev. Stat. tit. 9-B, § 226(2). The Maine Attorney General’s argument that “[c]ertain documents maintained by these agencies are confidential by statute” incorrectly equates “confidentiality” with a restriction on the Attorney General’s right to access these documents as counsel for the agencies at issue. Dkt. 738-16 at 2 (citing Me. Rev. Stat. tit. 22, § 4008)). First, this cited statute relates to the Maine Department of Health and Human Services,

and thus is inapplicable to any of the other state agencies at issue. *See* Me. Rev. Stat. tit. 22, § 1-A. Second, the cited statute creates confidentiality restrictions preventing public disclosure of documents containing a child’s personally identifying information in connection child protective activities and when a child is in the custody or care of that department. Me. Rev. Stat. Title 22, § 4008(1). Finally, and contrary to the Maine Attorney General’s argument, the cited statute specifically states that these records “are available” to “legal counsel for the department” and thus the cited statute actually provides the Maine Attorney General an explicit legal right to obtain and access these documents of the Maine Department of Health and Human Services (one of the agencies at issue here) when acting as counsel for that agency. The Court thus finds that Title 22, § 4008(1) directly satisfies *Citric Acid*’s requirement of a showing of a legal right to access the documents of that state agency.

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both counsel for a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The Maine Attorney General’s likely role as counsel for the agencies at issue would inherently involve obtaining necessary documents for effective representation in litigation. In acting as counsel, the Maine Attorney General would necessarily have access to and thus control over the

1 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at  
2 \*5–6 (finding state Attorney General has control over agency documents “based on his broad  
3 statutory and common law powers to control and manage legal affairs on behalf of state agencies,  
4 has a legal right to obtain responsive documents from the state agencies referenced in the  
5 Complaint”).

6 To the extent the Maine Attorney General argues that the Maine Attorney General “has a  
7 unique role in Maine government, distinct from the executive branch,” *see* dkt. 738-16 at 2, that  
8 argument misapprehends the “legal control” test for documents – the issue is not simply whether  
9 one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-  
10 subsidiary relationship), and not simply whether the two entities are legally separate (such as two  
11 different and separately incorporated entities), but rather whether there is a legal right to obtain the  
12 documents as explained by *Citric Acid*. While the Maine Attorney General is a separate entity and  
13 brought the instant action in the exercise of “independent authority,” dkt. 738-16 at 2, that fact alone  
14 does not outweigh the implications flowing from the fact that the Maine Attorney General will act  
15 as the agencies’ counsel. “The control analysis for Rule 34 purposes does not require the party to  
16 have actual managerial power over the foreign corporation, but rather that there be close  
17 coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-  
18 client relationship between the state Attorney General and the state agencies (a relationship  
19 mandated by state law) necessitates close coordination. While operational control may be a factual  
20 situation which demonstrates a legal right to obtain the documents, the absence of such “executive  
21 or functional control” is not determinative for evaluating “control” for purposes of discovery. By  
22 definition, the “legal control” issue for discovery arises when there are two legally distinct or  
23 separate entities – otherwise, if only one entity were involved, there would be no dispute that party  
24 discovery covered that one entity. As discussed above, courts have found “control” for purposes of  
25 discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary  
26 having control over the documents of a parent corporation, or an individual government officer  
27 having control over the documents of an entire agency. Thus, arguing that “the agencies that Meta  
28 has identified are administered by the Governor or officials she appoints. The autonomy of the

[Maine] Attorney General from these officials and agencies is well-settled,” dkt. 738-14 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Maine Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

The Maine Attorney General’s argument that “[w]hen acting as counsel to an agency, he [the Maine Attorney General] has no more legal control of client documents than Meta’s lawyers have of Meta’s documents,” is a variation on the argument rejected above (such as in the discussion of this issue with regard to California) that lawyers are somehow helpless or absolved of all duty to supervise and, if necessary, directly obtain documents from clients for discovery. *Id.* Contrary to the Maine Attorney General’s argument “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Federal Rules of Civil Procedure contemplate and require that counsel take proactive steps, without the need for constant court intervention, to comply with and collaborate on discovery, including taking appropriate steps to collect (or supervise the collection) of documents from clients. The system for rational and reasonable discovery and disclosures under the Federal Rules would fall apart if lawyers were simply relieved of any legal duty or obligations to obtain documents for production in discovery from their clients. As discussed above, that legal duty is jurally related to and logically another facet of a legal right to obtain documents. Here, where the law requires the state Attorney General to represent the agencies at issue (and where the state Attorney General has confirmed that representation in this matter), there is no basis to avoid those obligations and their attendant legal rights.

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the



opposing party there. *Id.* at 356 n.5. In that case, Maine is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that Maine was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the Maine Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

## **XVI. MARYLAND**

In opposition to the control issue, the Maryland Attorney General argues primarily the following factors: (1) the Maryland Attorney General is a separate entity and independent from the Maryland agencies; (2) the Maryland Attorney General brought the lawsuit under its own independent law enforcement capacity; and (3) the Maryland Attorney General would have to utilize public channels in order to obtain documents from the Maryland agencies, which does not amount to control over the Maryland agencies' documents. [Dkt. 738-17 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that Maryland agencies are proscriptively barred from obtaining counsel other than the Maryland Attorney General without Maryland Attorney General approval – with few exceptions not relevant to the listed Maryland agencies. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Center for School Safety, Department of Budget and Management, Department of Commerce, Department of Health, Department of Human Services, Governor's Office, Higher Education Commission, and State Department of Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Maryland Attorney General has legal control, for purposes of discovery, over the Maryland agencies in dispute. While the Maryland Attorney General is a separate entity and while the Maryland Attorney General does bring the instant action exercising its own

independent authority, this does not outweigh the fact that the Maryland Attorney General will act as the agencies' counsel. First, the Maryland "Attorney General has general charge of the legal business of the State." Md. Code, State Gov't § 6-106(a). Second, the statutory scheme in Maryland requires that "[t]he Attorney General is the legal adviser of and *shall* represent and otherwise perform *all of the legal work* for each officer and *unit of the State government*." Md. Code, State Gov't § 6-106(b) (emphasis added). Specific Maryland statutory schemes for agencies echo and reinforce that the Maryland Attorney General is the legal representative for each of those agencies, including agencies at issue here. *See e.g.*, Md. Code, Health-Gen. § 2-107 ("The Attorney General is legal adviser to the Department [of Health]."); Md. Code, Econ. Dev. § 2-116 (Department of Commerce); Md. Code, Human Serv. § 2-208 (Department of Human Services). The Maryland Constitution makes clear that the Governor is also to be represented by the Maryland Attorney General. Md. Const. art. 5, § 3(d) ("The Governor may not employ additional counsel [other than the Maryland Attorney General], in any case whatever, unless authorized by the General Assembly.").

Importantly, the Maryland Attorney General's arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the Maryland agencies at issue here to employ or obtain counsel in this matter other than the Attorney General absent consent. [Dkt. 738-13 at 2]. Agencies in Maryland may not employ other counsel without the Maryland Attorney General's approval, and there is no such approval in the record. Md. Code, State Gov't § 6-106(c). The Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Maryland Center for School Safety and the Maryland Department of Human Services. [Dkt. 1031-4 at 634–717]. Neither of these state agencies are allowed to employ legal counsel other than the Maryland Attorney General absent consent and thus by statute each will likely be represented by the Maryland Attorney General in this matter for discovery. *See* Md. Code, State Gov't. § 6-106(c). This arrangement indicates strongly that the state Attorney General, in fulfilling its role as the legal adviser of each unit of the State government, would necessarily and inherently have access to and control over the necessary documents for effective legal representation

of these state agencies. Therefore, the Court concludes that the Maryland Attorney General has legal control, for the purposes of discovery, over the documents held by the Maryland agencies listed by Meta, including in particular the three agencies recently listed in the intent to issue subpoenas.

Indeed, the Maryland Attorney General confirmed that its office could represent all of the Maryland agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 15–16]. Accordingly, it appears that under the statutory scheme each agency will likely be represented by the Maryland Attorney General in this matter for discovery. *See* Md. Code, State Gov’t. § 6-106. Thus, because the Maryland Attorney General will likely be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Maryland Attorney General has taken the position that communications between the Maryland Attorney General and these state agencies would be covered by the attorney-client privilege if such agencies are represented by the Maryland Attorney General. [Dkt. 738-17 at 2]. To the extent that the Maryland Attorney General has attempted to subdivide its own office between the enforcement team in this case and other attorneys within the Office of the State Attorney General in order to somehow argue that the scope of attorney-client privilege is limited only to some parts of the State Attorney General’s office but not to other teams, that argument is not supported by citation to law and is contrary to the weight of legal authority. *Id.* at 2 n.2. The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. This principle, known as the ‘rule of imputed disqualification,’ . . . requires disqualification of all members of a law firm when any one of them practicing alone would be disqualified because of a conflict of interest . . . . The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office

or the office of the state public defender.”); accord *City of Cnty. of Denver*, 37 P.3d at 457; see also *Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); cf. also *Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); cf. also *Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that no courts support the Maryland Attorney General’s argument that different individual lawyers in the Maryland Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Maryland Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the “team” of attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the Maryland Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue

1 that on one hand the [State] Attorney General represents these individuals, but that for discovery  
2 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,  
3 2014 WL 1796661, at \*2. To the extent the Maryland Attorney General is asserting that the  
4 attorney-client privilege would apply to communications between the Maryland Attorney General’s  
5 office and the agencies at issue, that further supports the conclusion of control here. Assertion of  
6 the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client  
7 relationship. *See Graf*, 610 F.3d at 1156. Just as the *Perez* Court rejected the inconsistent approach  
8 to privilege there, here the Maryland Attorney General argues that “[t]he [Maryland Attorney  
9 General] attorneys that are counsel to independent state agencies are distinct from the [Maryland  
10 Attorney General] attorneys who are working on the instant matter. The [Maryland Attorney  
11 General] attorneys comprising the enforcement team do not have an attorney-client relationship with  
12 any independent state agencies.” [Dkt 738-18 at 2 n.2]. The Maryland Attorney General’s attempt  
13 to preserve the ability to assert the attorney-client privilege between the Maryland Attorney  
14 General’s office and the agencies at issue further supports the conclusion of control. It is illusory  
15 to argue that individual attorneys within the Maryland Attorney General’s office have their own  
16 separate attorney-client relationships with the state agencies. The Maryland Attorney General has  
17 already confirmed that their office could do so for discovery in this matter. [Dkt. 738-1 at 13].  
18 Assertion of the attorney client privilege requires, as a prerequisite, the existence of an attorney-  
19 client relationship and here the individual attorneys within the Maryland Attorney General’s office  
20 are not treated like solo practitioners.

21 Further, there is no statutory, legal, or administrative rule cited which prohibits the Maryland  
22 Attorney General from accessing the documents of the state agencies at issue for purposes of  
23 discovery. The Maryland Attorney General’s argument that the Maryland Attorney General must  
24 use either the Maryland Public Information Act, Md. Code, Gen. Prov. §§ 4-101 through 4-601, or  
25 a subpoena to obtain documents from state agencies who are their client is not a credible  
26 interpretation of the Maryland Public Information Act – there is no citation that a public records  
27 request is the only way for the Maryland Attorney General to get documents from state agencies  
28 they are representing in litigation. [Dkt. 738-8 at 2]. If the Maryland Attorney General were correct,

then the Maryland Attorney General would have to submit a Public Information Act request every time they represent a state agency, to get documents from its own client - which is not merely impractical and not believable but also contrary to the principles of effective legal representation. As counsel, the Maryland Attorney General will have the normal type of direct access to the necessary documents from its own clients, without resorting to public channels, ensuring efficient and comprehensive legal support for the agencies involved. The Maryland Public Information Act is not an impediment to that access, because that Act only applies to records which are to be produced for public inspection (and not for purposes of litigation such as this case in which there is a Protective Order limiting public availability of confidential documents). Md. Code, Gen. Prov. § 4-103. Further, the Maryland Public Information Act nowhere states that this statute is the only means by which the Maryland Attorney General can obtain records from other state agencies – the statute merely sets up a permissive system for public inspection, not a restriction or limitation on access. Indeed, the Maryland Attorney General has cited no precedent requiring the Maryland Attorney General to use either a Public Information Act request or a subpoena to obtain documents from state agencies represented in litigation by the Maryland Attorney General. The Court finds this argument to be wholly unpersuasive. Finally, the argument that there is no statute specifically authorizing the Maryland Attorney General to obtain documents from state agencies assumes an overly restrictive view of the control test for documents. [Dkt. 738-17 at 2]. To the contrary, courts have recognized that control for purposes of document discovery is liberally construed. *E.g.*, *Miniace*, 2006 WL 335389, at \*1; *Evans*, 2010 WL 1136216, at \*1–2; *Inland Concrete Enterprises, Inc.*, 2011 WL 13209239, at \*3–4.

The Maryland Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the Maryland Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the



1 Complaint”). To the extent the Maryland Attorney General argues that “the [Maryland] Attorney  
2 General has no control over the state agencies previously identified by Meta, as typically, Maryland  
3 state agencies are part of the Executive Department and they report to the Governor,” *see* dkt. 738-  
4 17 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply  
5 whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-  
6 owned-subsidiary relationship), and not simply whether the two entities are legally separate (such  
7 as two different and separately incorporated entities), but rather whether there is a legal right to  
8 obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does  
9 not require the party to have actual managerial power over the foreign corporation, but rather that  
10 there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here,  
11 the attorney-client relationship between the state Attorney General and the state agencies (a  
12 relationship mandated by state law) necessitates close coordination. While operational control may  
13 be a factual situation which demonstrates a legal right to obtain the documents, the absence of such  
14 “executive or functional control” is not determinative for evaluating “control” for purposes of  
15 discovery. By definition, the “legal control” issue for discovery arises when there are two legally  
16 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute  
17 that party discovery covered that one entity. As discussed above, courts have found “control” for  
18 purposes of discovery where a party is clearly not in managerial control over the third-party, such  
19 as a subsidiary having control over the documents of a parent corporation, or an individual  
20 government officer having control over the documents of an entire agency. *See, e.g., Diven v.*  
21 *Souders*, No. 1:21-CV-01276-BAH, 2024 WL 184345, at \*3 (D. Md. Jan. 17, 2024) (finding named  
22 defendants (correctional officers) have control over documents of Maryland Department of Public  
23 Safety & Correctional Services). Thus, arguing that the Maryland “Attorney General and the  
24 Governor are separate constitutional officers,” dkt. 738-17 at 2, is simply re-stating the issue to be  
25 decided, and not determinative of the issue. The Maryland Attorney General’s arguments  
26 erroneously conflate the legal control issue with “operational control” or “functional independence”  
27 of each entity, and thus is insufficient to rebut a finding of legal control of the documents for  
28 purposes of discovery.

Finally, the Maryland Attorney General does not cite any statutory or legal prohibition on the Maryland Attorney General's representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control."). Indeed, one court has noted that "[i]n general, an attorney is presumed to have control over documents in its client's possession." *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

## **XVII. MICHIGAN**

In opposition to the control issue, the Michigan Attorney General argues primarily the following factors: (1) the Michigan Attorney General is a separate entity and independent from the Michigan agencies; and (2) the Michigan Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-18 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that the Michigan Attorney General must act as counsel for the Michigan agencies. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Education, Department of Health and Human Services, Department of Labor and Economic Opportunity, Department of Lifelong Education, Advancement, and Potential, Executive Office of the Governor, and State Budget Office. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in

favor of a finding that the Michigan Attorney General does have legal control, for purposes of discovery, over the listed Michigan agencies. While the Michigan Attorney General is a separate entity and while the Michigan Attorney General does bring the instant action exercising its own independent authority, this does not outweigh the fact that the Michigan Attorney General will act as the agencies’ counsel. First, the Michigan Attorney General admits that “[t]he Attorney General serves as counsel to the Governor and state agencies.” Dkt. 738-17 at 2 (citing Mich. Comp. Laws § 14.28 (“The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party[.]”). Under Michigan’s statutory scheme, “the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.” Mich. Comp. Laws § 14.28. As the Michigan Court of Appeals noted, “[u]nder our scheme of laws, the **attorney general has the duty** as a constitutional officer possessed with common law as well as statutory powers and duties **to represent** or furnish legal counsel to many interests-the State, **its agencies**, the public interest and others designated by statute.” *Att’y Gen. v. Michigan Pub. Serv. Comm’n*, 625 N.W.2d 16, 29 (Mich. Ct. App. 2000) (quoting *State ex rel. Allain v. Mississippi Pub. Serv. Comm’n*, 418 So. 2d 779, 783 (Miss. 1982)) (emphasis added).

Importantly, the Michigan Attorney General’s arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the Michigan agencies at issue here to employ or obtain counsel in this matter other than the Attorney General absent consent. [Dkt. 738-13 at 2]. The Michigan Attorney General has the mandatory duty to defend agencies in Michigan in all suits relating to matters connected with their departments upon request of the Governor. Mich. Comp. Laws, § 14.29. Indeed, the Michigan Attorney General confirmed that its office could represent all of the Michigan agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 16–17]. Accordingly, it appears that under the statutory scheme each agency will likely be represented by the Michigan Attorney General in this matter for discovery. *See* Mich. Comp. Laws, § 14.29. Thus, because the Michigan Attorney

General will likely be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Michigan Attorney General has taken the position that communications between the Michigan Attorney General and these state agencies are subject to the attorney-client privilege (with no limitations as to time frame). [Dkt. 738-18 at 2]. By definition, an attorney-client relationship is a prerequisite to assertion of the attorney-client privilege. *See Graf*, 610 F.3d at 1156. Thus, the Michigan Attorney General’s admission that it has an existing (indeed pre-existing) attorney-client relationship with the agencies at issue lends further support for a finding of a legal right of access and thus control over the documents of these state agencies.

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. Here, the Michigan Attorney General admits that “to the extent the Attorney General has any ‘control’ over a listed state agency, it is exclusively in the attorney-client context.” [Dkt. 738-18 at 2]. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The Michigan Attorney General’s likely role as counsel for the agencies at issue would inherently involve obtaining necessary documents for effective representation in litigation. In acting as counsel, the Michigan Attorney General would necessarily have access to and thus control over

1 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,  
2 at \*5–6 (finding state Attorney General has control over agency documents “based on his broad  
3 statutory and common law powers to control and manage legal affairs on behalf of state agencies,  
4 has a legal right to obtain responsive documents from the state agencies referenced in the  
5 Complaint”). To the extent the Michigan Attorney General argues that the “the [Michigan] Attorney  
6 General has no relevant authority to direct state agencies’ conduct, all of which conduct falls under  
7 the Governor’s constitutionally distinct purview,” *see* dkt. 738-18 at 2, that argument misapprehends  
8 the “legal control” test for documents – the issue is not simply whether one entity is under the day-  
9 to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and  
10 not simply whether the two entities are legally separate (such as two different and separately  
11 incorporated entities), but rather whether there is a legal right to obtain the documents as explained  
12 by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual  
13 managerial power over the foreign corporation, but rather that there be close coordination between  
14 them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship  
15 between the state Attorney General and the state agencies (a relationship mandated by state law)  
16 necessitates close coordination. While operational control may be a factual situation which  
17 demonstrates a legal right to obtain the documents, the absence of such “executive or functional  
18 control” is not determinative for evaluating “control” for purposes of discovery. By definition, the  
19 “legal control” issue for discovery arises when there are two legally distinct or separate entities –  
20 otherwise, if only one entity were involved, there would be no dispute that party discovery covered  
21 that one entity. As discussed above, courts have found “control” for purposes of discovery where a  
22 party is clearly not in managerial control over the third-party, such as a subsidiary having control  
23 over the documents of a parent corporation, or an individual government officer having control over  
24 the documents of an entire agency. *See Williams*, 2022 WL 22859198, at \*2 (finding named  
25 defendants, corrections officers, have control over third-party agency Michigan Department of  
26 Correction (MDOC) documents, noting that: “Here, Defendants are represented by the Michigan  
27 Attorney General, which has demonstrated access to [third-party agency] MDOC documents and  
28 materials in many cases before this Court.”). Thus, arguing that “the [Michigan] Governor—and

the agencies she oversees—are not under the [Michigan] Attorney General’s authority,” dkt. 738-18 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Michigan Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Indeed, at least one other federal court has previously found that the Michigan Attorney General has legal control over Michigan state agency materials. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with the applicable legal standards discussed above and in light of the facts and circumstances presented here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly consistent with, and to that extent further persuasively supports, the conclusion here with regard to the Michigan Attorney General’s having control with regard to documents of the state agencies at issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the objecting states including Michigan, this Court is disappointed that the Michigan Attorney General and Meta were unable to reach a negotiated resolution of this dispute, which other states were able to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

#### **XVIII. MINNESOTA**

In opposition to the control issue, the Minnesota Attorney General argues primarily the following factors: (1) the Minnesota Attorney General is a separate entity and independent from the Minnesota agencies; (2) the Minnesota Attorney General brought the lawsuit under its own independent law enforcement capacity; (3) the Minnesota agencies would create a “virtual veto” over the Minnesota Attorney General’s independent responsibilities to bring enforcement actions; (4) the Minnesota agencies are not required to use the Minnesota Attorney General as legal counsel; (5) Minnesota agencies are statutorily responsible for maintaining, preserving, retaining, and providing access to its own records; (6) the Minnesota Attorney General may not be able to obtain non-



public data from Minnesota agencies unless specifically authorized by statute or federal law; and (7) the Minnesota Attorney General would have to utilize public channels in order to obtain documents from the Minnesota agencies. [Dkt. 738-19 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues primarily that Minnesota agencies are proscriptively barred from obtaining counsel other than the Minnesota Attorney General without consent from the Minnesota Governor or if the Minnesota Attorney General is an adverse party. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Commerce, Department of Health, Department of Human Services, Education Department, Employment and Economic Development Department, Governor’s Office, Office of Higher Education, and Department of Management and Budget. *Id.*

The Court finds that the Minnesota Attorney General has control, for the purposes of discovery, of the listed Minnesota agencies. While the Minnesota Attorney General is a separate entity and while the Minnesota Attorney General does bring the instant action exercising its own independent authority, this does not outweigh the fact that the Minnesota Attorney General will act as the agencies’ counsel. Under Minnesota’s statutory scheme, “[t]he attorney general **shall** act as the attorney for all state officers and **all boards or commissions** created by law in all matters pertaining to their official duties.” Minn. Stat. § 8.06 (emphasis added). Minnesota law requires that “[t]he attorney general **shall appear** for the state in all causes in the supreme and **federal courts** wherein the state is directly interested.” Minn. Stat. § 8.01 (emphasis added). Absent exceptions which are not present or shown to exist here, “no additional counsel shall be employed and the legal business of the state shall be performed exclusively by the attorney general and the attorney general’s assistants.” *Id.*

Importantly, the Minnesota Attorney General’s arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the Minnesota agencies at issue here to employ or obtain counsel in this matter other than the Attorney General absent consent. [Dkt. 738-13 at 2]. Even in exceptional circumstances where different counsel may be employed, “the **attorney general** shall thereupon be authorized to employ such counsel” and not the agencies. Minn. Stat. § 8.06 (emphasis added). Indeed, the Minnesota Attorney General confirmed that its

office could represent all of the Minnesota agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 17–18]. Accordingly, it appears that under the statutory scheme each agency will likely be represented by the Minnesota Attorney General in this matter for discovery. *See* Minn. Stat. §§ 8.01, 8.06. Thus, because the Minnesota Attorney General will likely be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Minnesota Attorney General has taken the position that, “to the extent a separate division” of the Attorney General’s office “may be engaged by an agency,” communications between the Minnesota Attorney General and these state agencies are subject to the attorney-client privilege. [Dkt. 738-19 at 2]. To the extent the Minnesota Attorney General has attempted to subdivide its own office between the “CP Section” of attorneys currently prosecuting this case and other attorneys within the state Attorney General in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts of the state Attorney General’s office but not other teams, that argument is not supported by citation to law and is contrary to the weight of law. *Id.* The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. This principle, known as the ‘rule of imputed disqualification,’ . . . requires disqualification of all members of a law firm when any one of them practicing alone would be disqualified because of a conflict of interest . . . . The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of

imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that no courts support the Minnesota Attorney General’s argument that different individual lawyers in the Minnesota Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Minnesota Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the “team” of attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the Minnesota Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. To the extent the Minnesota Attorney General is asserting that the attorney-client privilege would apply to communications between the Minnesota Attorney General’s office and the agencies at issue, that further supports the conclusion of control here. Assertion of

1 the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client  
2 relationship. *See Graf*, 610 F.3d at 1156. Just as the Court in *Perez* rejected the inconsistent  
3 approach to privilege there, here the Minnesota Attorney General argues that “[t]o the extent a  
4 separate [Minnesota Attorney General] division (walled-off from the CP Section) may be engaged  
5 by an agency to provide legal services, communications between the agency and that separate  
6 [Minnesota Attorney General] division would likely be privileged.” [Dkt 738-19 at 2]. The  
7 Minnesota Attorney General’s attempt to preserve the ability to assert the attorney-client privilege  
8 between the Minnesota Attorney General’s office and the agencies at issue further supports the  
9 conclusion of control here. Here, it is illusory to argue that sub-teams attorneys within the  
10 Minnesota Attorney General’s office have their own separate attorney-client relationships with the  
11 state agencies. The Minnesota Attorney General has already confirmed that their office could  
12 represent these agencies for discovery in this matter. [Dkt. 738-1 at 13]. Assertion of the attorney-  
13 client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*,  
14 610 F.3d at 1156.

15 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement  
16 organization, the attorney general, is both a party to the case while also acting or able to act as  
17 counsel for a third party. However, this would not be the first time that a legal services provider, as  
18 a party, is found to have control over third party documents for purposes of discovery. *See, e.g.*,  
19 *Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients  
20 and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . .  
21 . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond  
22 as to responsive materials over which Salas and his law firm had possession, custody or control.”).  
23 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over  
24 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. Here, the Minnesota  
25 Attorney General admits that “to the extent the Attorney General has any ‘control’ over a listed state  
26 agency, it is exclusively in the attorney-client context.” [Dkt. 738-18 at 2]. The Court is not holding  
27 broadly that there must be a finding of a legal right of access to and thus control over third party  
28 client documents in every case involving a legal services provider as a party; rather, under the

particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The Minnesota Attorney General’s likely role as counsel for the agencies at issue would inherently involve obtaining necessary documents for effective representation in litigation. In acting as counsel, the Minnesota Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Minnesota Attorney General argues that the “Minnesota’s Governor and [Minnesota Attorney General] operate as independent elected officials under the state constitution,” *see* dkt. 738-19 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an

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entire agency. Thus, arguing that “[o]nly the Governor can compel agencies to act—including searching for and producing documents in their possession, custody, or control—because the [Minnesota] Governor, *not the [Minnesota Attorney General]*, has the authority to appoint agency commissioners who serve at the Governor’s pleasure,” dkt. 738-19 at 2 (emphasis in original), is simply re-stating the issue to be decided, and not determinative of the issue. The Minnesota Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Minnesota Attorney General from accessing the documents of the state agencies at issue for purposes of discovery. The Minnesota Attorney General’s argument that “each agency has control over its own data” and that therefore the Minnesota Attorney General must issue a public data request or a subpoena to obtain data from state agencies who are their client is not a credible interpretation of Minnesota law. Dkt. 738-19 at 2 (citing Minn. Stat. § 13.05(9)). There is no citation to law holding that a public records request is the only way for the Minnesota Attorney General to get documents from state agencies they are representing in litigation. [Dkt. 738-19 at 2]. If the Minnesota Attorney General were correct, then the Minnesota Attorney General would have to submit a Public Information Act request every time they represent a state agency, to get documents from its own client – which is not merely impractical and not believable but also contrary to the principles of effective legal representation. As counsel, the Minnesota Attorney General will have the normal type of direct access to the necessary documents from its own clients, without resorting to public channels, ensuring efficient and comprehensive legal support for the agencies involved. The cited Minnesota statute on Data Practices is not an impediment to that access, because that statute only applies to data which are to be produced for public inspection (and not for purposes of litigation such as this case in which there is a Protective Order limiting public availability of confidential documents). Minn. Stat. § 13.01. Further, the Minnesota statute nowhere states that this statute is the only means by which the Minnesota Attorney General can obtain records from other state agencies – the statute merely sets up a permissive system for public inspection, not a



1 restriction or limitation on access. Indeed, the Minnesota Attorney General has cited no precedent  
2 requiring the Minnesota Attorney General to use either a public request or a subpoena to obtain  
3 documents from state agencies represented in litigation by the Minnesota Attorney General. The  
4 Court finds this argument to be wholly unpersuasive.

5 Significantly, the Minnesota Attorney General ignores that this public data statute  
6 specifically exempts attorneys collecting data when those attorneys are acting as counsel for a  
7 government entity, and the statute specifically mandates that such attorneys’ uses and collections of  
8 data from agencies are governed by statutes, rules, and professional responsibility standards for  
9 discovery instead. Minn. Stat. § 13.393 (“Notwithstanding the provisions of this chapter and section  
10 15.17, the use, collection, storage, and dissemination of data by an attorney acting in a professional  
11 capacity for a government entity shall be governed by statutes, rules, and professional standards  
12 concerning discovery, production of documents, introduction of evidence, and professional  
13 responsibility[.]”). The Minnesota statutory scheme thus directly provides the Minnesota Attorney  
14 General an explicit legal right to obtain and access documents from the agencies at issue pursuant  
15 to the normal rules and statutes for discovery, when acting as counsel for those agencies. The Court  
16 thus finds that Minn. Stat. § 13.393 directly satisfies *Citric Acid*’s requirement of a showing of a  
17 legal right to access the documents of the state agencies at issue.

18 The Court rejects the Minnesota Attorney General’s argument that there is no law “that  
19 grants the [Minnesota Attorney General] blanket authority to obtain agency documents upon  
20 demand” in light of this statute and in light of the fact that the control test under *Citric Acid* does  
21 not require “blanket authority.” [Dkt. 738-19 at 2].

22 Next, the Minnesota Attorney General argues that “[r]equiring the [Minnesota Attorney  
23 General] to produce agency documents would upend the constitutional division of powers because  
24 the [Minnesota] Governor would be able to impermissibly control the [Minnesota Attorney  
25 General’s] litigation by, for example, instructing agencies to refuse to produce documents.” [Dkt.  
26 738-19 at 2]. This is the same “virtual veto” argument advanced by several other states’ Attorneys  
27 General and discussed above. As explained previously, the Court finds the “virtual veto” argument  
28 to be speculative and unpersuasive. This argument is based on an unfounded assumption that the

Governor and state agencies would inexplicably obstruct a state’s attorney general’s independent law enforcement responsibilities. This argument rests entirely on an unreasonable, unfounded, hypothetical assumption that, despite this Court issuing an Order finding control, the Governor and state agencies would simply refuse to provide documents based on nothing more than an obstinate and unreasoned disagreement. The Minnesota Attorney General presented no facts, no affidavits, no prior examples of state agency refusals, and no testimony to support this feared response by the Governor or state agencies. Contrary to the unfounded assumption that state agencies will refuse to provide documents, the Court presumes, instead, that parties (including third parties such as the agencies at issue here) will act reasonably in the face of a court Order and will comply with the Federal Rules of Civil Procedure. The argument also directly contradicts the well-established legal principle and statutory scheme that a state attorney general, acting as counsel, inherently has access to relevant documents to effectively represent a state agency.

#### **XIX. MISSOURI**

In opposition to the control issue, the Missouri Attorney General argues primarily the following factors: (1) the Missouri Attorney General is a separate entity and independent from the Missouri agencies; (2) the Missouri Attorney General brought the lawsuit under its own independent law enforcement capacity; (3) the Missouri Attorney General does not seeking relief on behalf of the Missouri agencies; (4) Missouri agencies are statutorily responsible for maintaining, preserving, retaining, and providing access to its own records; and (5) under Missouri case law, Missouri agencies are not required to produce records of another agencies and it is prohibited from disseminating records of any agency other than its own records. [Dkt. 738-20 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues primarily that the Missouri Attorney General is tasked with appearing in and defending any proceeding or tribunal in which the state’s interests are involved. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Economic Development, Department of Elementary and Secondary Education, Department of Health and Senior Services, Department of Higher Education & Workforce Development, Department of Mental Health, Department of Social Services, Office of Administration, Office of the Child Advocate, and Governor’s Office. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Missouri Attorney General has legal control, for purposes of discovery, over the documents of the listed Missouri agencies. While the Missouri Attorney General is a separate entity and while the Missouri Attorney General does bring the instant action exercising its own independent authority, this does not outweigh the fact that the Missouri Attorney General will act as the agencies’ counsel. First, the Missouri Attorney General “may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state’s interests are involved.” Mo. Stat. § 27.060. It is self-evident that, when a Missouri agency is the subject or target of discovery, the state’s interests are involved.

Importantly, the Missouri Attorney General’s arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the Missouri agencies at issue here to employ or obtain counsel in this matter other than the Attorney General. [Dkt. 738-13 at 2]. Indeed, under Missouri precedent, “[t]he Attorney General is authorized to represent the interests of the State generally.” *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. Ct. App. 2009). Indeed, the Missouri Attorney General confirmed that its office could represent all of the Missouri agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 18]. Accordingly, it appears that under the statutory scheme each agency will likely be represented by the Missouri Attorney General in this matter for discovery. *See* Mo. Stat. § 27.060. Thus, because the Missouri Attorney General will likely be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Missouri Attorney General has taken the position that, “to the extent a separate division” of the Attorney General’s office “may be engaged by an agency,” communications between the Missouri Attorney General and these state agencies are subject to the attorney-client privilege. [Dkt. 738-20 at 2]. To the extent the Missouri Attorney General has attempted to subdivide its own office between the attorneys currently prosecuting this case and other attorneys within the state Attorney General in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts of the state Attorney General’s office but not “section counsel,” that argument is not supported by citation to law and is contrary to the weight of law. *Id.*

1 The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of  
2 the attendant attorney-client privilege) encompasses the entirety of a legal services organization due  
3 to well-known rules of imputation of confidences to a legal services organization, including a public  
4 law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a  
5 law firm, the principle of loyalty to the client extends beyond the individual attorney and applies  
6 with equal force to the other attorneys practicing in the firm. This principle, known as the ‘rule of  
7 imputed disqualification,’ . . . requires disqualification of all members of a law firm when any one  
8 of them practicing alone would be disqualified because of a conflict of interest . . . . The rule of  
9 imputed disqualification applies to both private firms and public law firms such as a district  
10 attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d  
11 at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious  
12 disqualification is the general rule, and that we should presume knowledge is imputed to all  
13 members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the  
14 presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in  
15 the context of government attorneys, which presumption could be rebutted by proper ethical  
16 screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue  
17 “should be screened from any direct or indirect participation in the matter,” vicarious  
18 disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer  
19 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is  
20 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of  
21 the entire prosecuting office is not necessary absent special facts, such as a showing of actual  
22 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public  
23 legal service organizations like private law firms and impute shared confidences among lawyers of  
24 the entire public law entity. Even in jurisdictions which do not automatically impute  
25 disqualification, and shared confidences, to an entire public law office, those courts recognize that  
26 ethical screening or other procedures are required out of recognition that actual (as opposed to  
27 imputed) sharing of confidences may occur and such procedures are required to avoid dissemination  
28 of attorney-client privileged communications within an entire public law organization. This review

of case law demonstrates that no courts support the Missouri Attorney General’s argument that different individual lawyers in the Missouri Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Missouri Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the Missouri Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. To the extent the Missouri Attorney General is asserting that the attorney-client privilege would apply to communications between the Missouri Attorney General’s office and the agencies at issue, that further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156. Just as the Court in *Perez* rejected the inconsistent approach to privilege there, here the Missouri Attorney General argues that Meta’s discovery is “so broad” as to encompass communications between “sections of the [Missouri Attorney General] not participating in this action” (at least, as of the date of this brief) and the agencies, and “there is the possibility that those agencies, in conjunction with their Agency section counsel” could assert privilege. [Dkt. 738-20 at 2]. The Missouri Attorney General’s attempt to preserve the ability to assert the attorney-client privilege between the Missouri Attorney General’s office and the agencies at issue further supports the conclusion of control here. Here, it is not convincing to argue that sub-teams attorneys within the Missouri Attorney General’s office have their own separate attorney-client relationships with the state agencies. The Missouri Attorney General has already confirmed that their office could represent these agencies for discovery in this matter. [Dkt. 738-20 at 18]. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further, there is no citation to any statutory or legal prohibition on the Missouri Attorney General's representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control."). Indeed, one court has noted that "[i]n general, an attorney is presumed to have control over documents in its client's possession." *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The Missouri Attorney General's likely role as counsel for the agencies at issue would inherently involve obtaining necessary documents for effective representation in litigation. In acting as counsel, the Missouri Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents "based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint"). To the extent the Missouri Attorney General argues that the "[Missouri Attorney General] is an elected official independent of the [Missouri] Governor," *see* *dk. 738-20* at 2, that argument misapprehends the "legal control" test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two



different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that “[t]he Governor, not the [Missouri Attorney General], has executive control over other state agencies,” dkt. 738-20 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Missouri Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Missouri Attorney General from accessing the documents of the state agencies at issue for purposes of discovery. The Missouri Attorney General’s argument that “an agency is not in possession of another’s records, and cannot produce that which it does not possess, it is error to compel one agency to produce another’s records” is fundamentally a legally erroneous proposition, because the argument focuses solely on “possession” and presumes incorrectly that Federal Rule of Civil Procedure 34 lacks the word control as a disjunctive basis for requiring party discovery. [Dkt. 738-20 at 2]. The Missouri Attorney General’s citation to and reliance on *Bedell* is inapposite. *Id.* (citing *Bedell v. Dir. of Revenue, State of Mo.*, 935 S.W.2d 94, 96 (Mo. Ct. App. 1996)). In *Bedell*, the

state court did not apply any version of the control test applicable under federal law such as *Citric Acid* – instead, the *Bedell* court focused exclusively on state law precedent limited to whether one agency “possessed” the documents of another agency. *Bedell*, 935 S.W.2d at 96. *Bedell* is legally irrelevant to the issue in dispute here, as well as presenting a factually distinguishable scenario.

Indeed, at least one other federal court has previously found that the Missouri Attorney General has legal control over Missouri state agency materials. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with the applicable legal standards discussed above and in light of the facts and circumstances presented here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly consistent with, and to that extent further persuasively supports, the conclusion here with regard to the Missouri Attorney General’s having control with regard to documents of the state agencies at issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the objecting states including Missouri, this Court is disappointed that the Missouri Attorney General and Meta were unable to reach a negotiated resolution of this dispute, which other states were able to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

## XX. MONTANA

In opposition to the control issue, the Montana Attorney General argues primarily the following factors: (1) the Montana Attorney General is a separate entity and independent from the Montana agencies; and (2) the Montana Governor could choose to employ counsel different from the Montana Attorney General. [Dkt. 738-21 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues primarily that the Montana Attorney General is tasked with appearing in and defending any proceeding or tribunal in which the state’s interests are involved. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Board of Public Education, Department of Commerce, Department of Public Health and Human Services, Governor’s Office, Office of the Commissioner

of Higher Education, and Office of Public Instruction. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Montana Attorney General has legal control, for purposes of discovery, over the documents of the listed Montana agencies. While the Montana Attorney General is a separate entity and while the Montana Attorney General does bring the instant action exercising its own independent authority, this does not outweigh the fact that the Montana Attorney General has broad authority to act as the agencies’ counsel.

First, under the Montana Constitution the Montana Attorney General is the “legal officer of the state and shall have the duties and powers provided by law.” Mont. Const. § 4(4). The Montana Supreme Court has held that Montana Court precedent supports the notion that the Montana Attorney has “**broad powers . . . as the first legal officer of the state.**” *Montana Power Co. v. Montana Dep’t of Pub. Serv. Regul.*, 709 P.2d 995, 1002 (Mont. 1985) (citing *State ex rel. Olsen v. Public Service Commission*, 283 P.2d 594 (Mont. 1955) [hereinafter *Olsen*]) (emphasis added). The Montana Supreme Court furthered that “the [Montana] Attorney General not only had the constitutional and statutory powers specifically enumerated for him, but **broad common law duties**, when not restricted or limited by statute.” *Id.* In *Olsen*, the Montana Supreme Court explained in fulsome detail the breadth of the powers of the state Attorney General:

[T]his court has repeatedly held that the attorney general has common-law powers and duties. The Attorney General is the principal law officer of the state. His duties are general. His authority is co-extensive with public legal affairs of the whole community . . . . The office of Attorney General is of ancient origin. The powers and duties appertaining to it were recognized by the common law, and the common law has been a part of our system of jurisprudence from the organization of Montana territory to the present day . . . . It is the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law, the office of Attorney General, as it existed in England, was adopted as a part of the governmental machinery, and that in the absence of express restrictions, the common-law duties attach themselves to the office so far as they are applicable and in harmony with our system of government . . . .

The authorities substantially agree that, in addition to those conferred on it by statute, the office is clothed with all of the powers and duties pertaining thereto at common law; and, as the chief law officer of the State, the Attorney General, in the absence of express legislative restriction to the contrary, may exercise all such power and authority

as the public interests may from time to time require. In short, the Attorney General’s powers are as broad as the common law unless restricted or modified by statute . . . .

Moreover, it is generally held that the attorney general, in addition to the powers and duties conferred and imposed upon him by statute, is clothed and charged with all the common-law powers and duties pertaining to his office as well, except in so far as they have been expressly restricted. The duties of the office are so numerous and varied that it has not been the policy of the state legislatures to attempt specifically to enumerate them; and it cannot be presumed, therefore, in the absence of an express inhibition, that the attorney general has not such authority as pertained to his office at common law. Accordingly, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time, require, and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights . . . .

The common-law duties of the attorney general, as chief law officer of the state, when not restricted or limited by statute, are very numerous and varied. In England, the Attorney General was the chief legal adviser of the Crown and was intrusted [sic] with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the Crown was interested. . . . Such being the nature of the rights and duties that attached to the position at its inception, it is generally held that in the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public . . . .

Obviously there can be no dispute as to the right of an attorney general to represent the state in all litigation of a public character. The attorney general represents the public and may bring all proper suits to protect its rights.

*Olsen*, 283 P.2d at 598–99 (internal quotations and citations omitted; emphasis added).

It is self-evident that, when a Montana agency is the subject or target of discovery, in a case such as this, such a proceeding is litigation of a public character, involves the public interests, and involves the public legal affairs of the state. *See id.* Indeed, in the complaint here discusses, in several sections, alleged harms to Montana consumers and young Montanans which implicate issues of public character and the public interest. *See, e.g., Montana v. Meta Platforms, Inc.*, No. 24-cv-00805, at Dkt. 1. Further, the multistate complaint expressly states that this action is in the public interest of the Filing States. *See Multistate Complaint at ¶ 12.*

Importantly, the Montana Attorney General’s arguments do not negate the fact that (unlike

other states) there is no cited law or statute which empowers any of the Montana agencies at issue here to employ or obtain counsel in this matter other than the Montana Attorney General. [Dkt. 738-21 at 2]. Indeed, the Montana Attorney General confirmed that its office could represent all of the Montana agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 19]. Accordingly, it appears that, under the broad common law and constitutional duties of the Montana Attorney General, each agency will likely be represented by the Montana Attorney General in this matter for discovery. *See* Mont. Const. § 4(4). Thus, because the Montana Attorney General will likely be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

Relatedly, the Montana Attorney General argues that, “[b]ecause the Montana Attorney General’s Office does not represent any of the six state entities at issue, its position is that pre-suit communications related to this matter between the [Montana Attorney General’s] Office and those entities are not protected by the attorney-client privilege.” [Dkt. 738-21 at 2]. That statement, however, is silent as to (and thus appears artfully drafted to leave open the possibility) whether the Montana Attorney General will assert privilege with respect to post-suit communications. The Court rejects the Montana Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege for pre-suit communications, while apparently attempting to preserve the ability to assert the privilege applies to post-suit communications. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. To the extent the Montana Attorney General implies its intention to assert that the attorney-client privilege would apply to communications between the Montana Attorney General’s office and the agencies at issue, that would further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further, the Montana Attorney General does not cite any statutory or legal prohibition on

the Montana Attorney General’s representing the state agencies in this matter for purposes of discovery. Indeed, the Montana Attorney General admits that “the Attorney General’s Office has statutory and common-law responsibility and authority to represent these agencies in certain circumstances.” [Dkt. 738-21 at 2]. Under *Olsen*, the broad common law power to represent the state’s agencies would only be limited by statute – and none is argued here. *Olsen*, 283 P.2d at 599. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have control over third party documents for purposes of discovery. See, e.g., *Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The Montana Attorney General’s likely role as counsel for the agencies at issue would inherently involve obtaining necessary documents for effective representation in litigation. In acting as counsel, the Montana Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. See *Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Montana Attorney General argues that state Constitution establishes “constitutionally independent executive offices, which are each separately elected and operate with



1 their own independent constitutional authority—including the Attorney General,” *see* dkt. 738-21  
2 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply  
3 whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-  
4 owned-subsidiary relationship), and not simply whether the two entities are legally separate (such  
5 as two different and separately incorporated entities), but rather whether there is a legal right to  
6 obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does  
7 not require the party to have actual managerial power over the foreign corporation, but rather that  
8 there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here,  
9 the attorney-client relationship between the state Attorney General and the state agencies (a  
10 relationship mandated by state law) necessitates close coordination. While operational control may  
11 be a factual situation which demonstrates a legal right to obtain the documents, the absence of such  
12 “executive or functional control” is not determinative for evaluating “control” for purposes of  
13 discovery. By definition, the “legal control” issue for discovery arises when there are two legally  
14 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute  
15 that party discovery covered that one entity. As discussed above, courts have found “control” for  
16 purposes of discovery where a party is clearly not in managerial control over the third-party, such  
17 as a subsidiary having control over the documents of a parent corporation, or an individual  
18 government officer having control over the documents of an entire agency. Thus, arguing that  
19 “Montana law provides that state records ‘are and remain the property of the public agency  
20 possessing the records,”” dkt. 738-21 at 2 (citing Mont. Code § 2-6-1013(1)), focuses on the  
21 irrelevant issue of “possession” and ignores the control issue to be decided. The Montana Attorney  
22 General’s arguments also erroneously conflate the legal control issue with “operational control” or  
23 “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control  
24 of the documents for purposes of discovery.

25 Further, there is no statutory, legal, or administrative rule cited which prohibits the Montana  
26 Attorney General from accessing the documents of the state agencies at issue for purposes of  
27 discovery. The Montana Attorney General’s argument that “even where the Attorney General *does*  
28 represent a state agency, the Office functions like an ordinary attorney serving its client, and thus

must obey the agency’s litigation decisions” is essentially the same argument rejected above that counsel is helpless in the face of an intransigent client and somehow has no duties to the Court to work on discovery, including supervising the collection of documents. Dkt. 738-20 at 2 (emphasis in original). Lawyers are not entirely helpless or absolved of all duty to supervise and, if necessary, directly obtain documents from clients for discovery. Contrary to the Montana Attorney General’s argument “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Federal Rules of Civil Procedure contemplate and require that counsel take proactive steps, without the need for constant court intervention, to comply with and collaborate on discovery, including taking appropriate steps to collect (or supervise the collection) of documents from clients. The system for rational and reasonable discovery and disclosures under the Federal Rules would fall apart if lawyers were simply relieved of any legal duty or obligations to obtain documents for production in discovery from their clients. As discussed above, that legal duty is jurally related to and logically another facet of a legal right to obtain documents. Here, the Montana Attorney General cites no law which permits them to avoid those obligations and their attendant legal rights.

For those reasons, the Court finds that the factors weigh in favor of a finding that the Montana Attorney General has legal control, for purposes of discovery, over the documents of the listed Montana agencies.

## **XXI. NEBRASKA**

In opposition to the control issue, the Nebraska Attorney General argues primarily the following factors: (1) the Nebraska Attorney General is a separate entity and independent from the Nebraska agencies; (2) the Nebraska Attorney General brought the lawsuit under its own independent law enforcement capacity; (3) the Nebraska Attorney General does not seek relief on behalf of the Nebraska agencies; and (4) Nebraska avers that “State agencies routinely refuse to provide information to [the Nebraska Department of Justice] Consumer Protection Bureau absent a third-party civil investigative demand, third-party subpoena, or a public records request[.]” [Dkt. 738-22 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues

1 based primarily on the following factors: (1) under Nebraska law, the Nebraska Attorney General  
2 has general control and supervision of all legal business of all Nebraska departments and bureaus,  
3 and (2) Nebraska agencies are proscriptively barred from obtaining counsel other than the Nebraska  
4 Attorney General without consent from the Nebraska Attorney General or Nebraska Governor. *Id.*  
5 at 3. Here, Meta seeks discovery from the following agencies: the Children’s Commission,  
6 Department of Administrative Services, Department of Economic Development, Department of  
7 Education, Department of Health and Human Services, and Governor. *Id.*

8 After considering the factors argued in the briefs, the Court finds that the factors weigh in  
9 favor of a finding that the Nebraska Attorney General does have legal control, for purposes of  
10 discovery, over the listed Nebraska agencies. While the Nebraska Attorney General is a separate  
11 entity and while the Nebraska Attorney General does bring the instant action in its own independent  
12 authority, this does not outweigh the legal right to access agencies’ documents which result from  
13 the requirement that the Nebraska Attorney General must statutorily act as the Nebraska agencies’  
14 counsel.

15 Under Nebraska’s statutory scheme, the Nebraska Attorney General has “the general control  
16 and supervision of all actions and legal proceedings in which the State of Nebraska may be a party  
17 or may be interested, and ***shall have charge and control of all the legal business of all departments***  
18 ***and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel***  
19 ***in order to protect the interests of the state.***” Neb. Rev. Stat. § 84-202 (emphasis added).  
20 Additionally, “[t]he [Nebraska] Attorney General is authorized to appear for the state and prosecute  
21 and defend, in any court or before any officer, board or tribunal, any cause or matter, civil or  
22 criminal, in which the state may be a party or interested.” Neb. Rev. Stat. § 84-203.

23 Further, there is no citation to any statutory or legal prohibition on the Nebraska Attorney  
24 General’s representing the state agencies in this matter for purposes of discovery. Indeed, under  
25 Nebraska law, the Nebraska Attorney General shall “prosecute or defend for the state ***all civil*** or  
26 criminal actions and proceedings relating to any matter connected with any of such officers’  
27 departments if, after investigation, he or she is convinced there is sufficient legal merit to justify the  
28 proceeding” upon “the request of the Governor, head of any executive department, Secretary of

State, State Treasurer, Auditor of Public Accounts, Board of Educational Lands and Funds, State Department of Education, or Public Service Commission.” Neb. Rev. Stat. § 84-205(5) (emphasis added). In any such actions, the state agencies “*shall not pay or contract to pay* from the funds of the state *any money for special attorneys* or counselors-at-law unless the employment of such special counsel is made upon the written authorization of the Governor or the Attorney General.” *Id.* (emphasis added). The Nebraska statutory scheme makes clear the Nebraska legislature’s strong preference that the Nebraska Attorney General represent state agencies in civil matters.

Indeed, the Nebraska Attorney General confirmed that its office could represent all but one of the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 19–20]. With respect to the one exception (the Nebraska Governor), the briefs and submissions from the Nebraska Attorney General do not explain how (in light of the Nebraska statutory scheme) the Nebraska Governor would not be represented by the Attorney General. The Nebraska cites no statutory or legal provision which bars the Nebraska Attorney General from representing the Nebraska Governor. The Nebraska Attorney General concedes that “[w]hen a Nebraska state agency receives a subpoena, it *may choose* to seek assistance from the [Nebraska Department of Justice] Legal Services and Civil Litigation Bureaus, who can serve as outside counsel for certain agencies.” Dkt. 738-22 at 2 (emphasis added). As discussed, no separate counsel has appeared for any Nebraska state agencies, despite the fact that litigation holds have been issued and the agencies have had notice of the pendency of discovery in this matter for some time. Accordingly, based on the statutory scheme and the record before the Court, the Nebraska Attorney General will likely represent these state agencies for purposes of discovery.

As part of the argument stressing the separation of the Attorney General’s office from the state agencies, the Nebraska Attorney General relies on a “governmental structure” argument to subdivide the office of the Nebraska Attorney General for purposes of this dispute. Dkt. 738-22 at 2. The Nebraska Attorney General argues that “there is a critical distinction between the [Nebraska Department of Justice] when it acts affirmatively in its capacity as enforcer of state consumer protection law (as it does in this lawsuit) and the [Nebraska Department of Justice] when it acts defensively in its role as outside counsel for state agencies.” *Id.* (uncited). The Nebraska Attorney

General argues that the “organizational structure” of the Nebraska Department of Justice “distinguishes between the [Nebraska Department of Justice’s] Consumer Protection Bureau, which represents the state and state consumers as enforcers of Nebraska’s consumer protection laws, and the [Nebraska Department of Justice’s] Legal Services and Civil Litigation Bureaus, which advise certain state agencies and occasionally represent them in court.” *Id.* The Nebraska Attorney General asserts that these distinctions are germane to this “control” dispute without explaining how or why. Further, the Nebraska Attorney General cites no law which finds these administrative, operational groupings of lawyers within that office as relevant, much less critical, to the determination of “control” under Rule 34.

Consistent with the “structural” argument, the Nebraska Attorney General argues that communications between different sections of the Nebraska Attorney General are ethically walled off where there are conflicts of interest and, on that basis, argues for a finding of no control. [Dkt. 738-22 at 2]. The Nebraska Attorney General cites no law, regulation, or statute which requires the alleged ethical walls between different bureaus within the Attorney General’s office to be established in cases such as this Multi-District Litigation, where there is no basis for a conflict of interest to exist between the Attorney General’s office and any of the state agencies at issue. The mere citation to the general rule of professional conduct regarding avoiding conflicts of interest is, alone, not persuasive. [Dkt. 738-22 at 2 (citing Neb. R. of Prof. Cond. § 3-501.7)]. The fact that ethical walls were set up in prior (unexplained and uncited) cases, where no affidavit or evidence attests to any ethical wall being set up in this Multi-District Litigation. As discussed, litigation holds have been issued to the state agencies and there has been ample time for ethical walls to be established and for separate counsel to appear, if any were to appear. On the current record before the Court, these “structural” arguments regarding sub-teams within the Nebraska Attorney General’s office do not suffice to overcome the finding of “control” for purposes of discovery, much like similar arguments regarding subdividing public law offices do not establish that there are separate, discrete attorney-client relationships within the Nebraska Attorney General’s office and the agencies at issue for purposes of this Multi-District Litigation.

To the extent the Nebraska Attorney General has attempted to subdivide its own office

1 between the prosecution team in this case and other divisions of the state Attorney General in order  
2 to somehow argue that there is no “legal control,” that argument is not supported by citation to law  
3 and is contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing  
4 therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety  
5 of a legal services organization due to well-known rules of imputation of confidences to a legal  
6 services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930  
7 (“The rule of imputed disqualification applies to both private firms and public law firms such as a  
8 district attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*,  
9 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious  
10 disqualification is the general rule, and that we should presume knowledge is imputed to all  
11 members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the  
12 presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in  
13 the context of government attorneys, which presumption could be rebutted by proper ethical  
14 screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue  
15 “should be screened from any direct or indirect participation in the matter,” vicarious  
16 disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer  
17 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is  
18 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of  
19 the entire prosecuting office is not necessary absent special facts, such as a showing of actual  
20 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public  
21 legal service organizations like private law firms and impute shared confidences among lawyers of  
22 the entire public law entity.

23 The Nebraska Attorney General’s role as counsel for the agencies at issue inherently  
24 involves obtaining necessary documents for effective representation in litigation. In acting as  
25 counsel, the Nebraska Attorney General would necessarily have access to and thus control over the  
26 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at  
27 \*5–6 (finding state Attorney General has control over agency documents “based on his broad  
28 statutory and common law powers to control and manage legal affairs on behalf of state agencies,



has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). The fact that there might be different sub-teams or different individual attorneys working on responding to the state agency discovery requests, as compared to the attorneys working on prosecuting this action, does not obviate the fact that these are all attorneys within the same public law office. If, as here, the Attorney General’s office is counsel for the agencies, then the Attorney General’s office will have a legal right to access the state agencies’ documents, and there is no law which alters that conclusion simply because different individual lawyers within the same legal services organization have the direct communications and relationships with the state agencies. Simply put, there is no cited law which determines whether specific individuals within an organization themselves have individualized “control” under Rule 34 where they are seeking access to the documents on behalf of the organization as a whole.

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The Nebraska Attorney General argues (without citation to caselaw) that “State agencies routinely refuse to provide information to NE DOJ Consumer Protection Bureau absent a third-party civil investigative demand, third-party subpoena, or a public records request, all of which would be

1 handled by the agency according to its protocols.” [Dkt. 738-22 at 2]. As an initial matter, it is not  
2 surprising that, in cases where the Nebraska Attorney General is investigating an agency itself for  
3 potential violations of law, that agency would refuse to provide information absent formal process.  
4 But the fact that state agencies would sometimes require formal investigative demands or subpoenas  
5 in other cases says nothing about whether or not there is “control” for the documents at issue here.  
6 As noted, there is no basis to assume that the Nebraska Attorney General and the state agencies have  
7 any adversity or conflicts of interest with regard to this Multi-District Litigation. Indeed, the  
8 contrary is true given that the Nebraska Attorney General has declared that this action is in the public  
9 interest of the State of Nebraska. *See* Multistate Complaint at ¶ 12.

10 Further, this argument ignores that agencies’ “routinely” requesting investigative demands  
11 or subpoenas or records requests in other cases (apparently where the Attorney General is adverse  
12 to the agencies) does not obviate the fact that, here where the Attorney General is counsel  
13 representing the agencies, such formal processes are not needed. The Nebraska Attorney General  
14 cites no law supporting the view that an investigative demand, subpoena, or public records request  
15 are the only ways for the Nebraska Attorney General to obtain documents from state agencies when  
16 they are clients. [Dkt. 738-25 at 2]. Indeed, the Nebraska Attorney General implicitly concedes  
17 that there are other avenues for that office to obtain documents from state agencies when this  
18 argument is limited by the word “routinely.” *Id.* If the Nebraska Attorney General intends to imply  
19 that formal mechanisms for obtaining agency documents are the only mechanisms, then the  
20 Nebraska Attorney General would have to subpoena, or serve an investigative demand, or submit a  
21 public records request every time the lawyers of that office were representing a state agency, to get  
22 documents from their own client – which is not merely impractical but also contrary to the principles  
23 of effective legal representation. As counsel for the agencies (and not prosecuting or investigating  
24 the agencies), the Nebraska Attorney General will have the normal type of direct access to the  
25 necessary documents from its own clients, without resorting to public channels, ensuring efficient  
26 and comprehensive legal support for the agencies involved consistent with the ethical obligations  
27 and applicable rules of professional conduct. To the extent the Nebraska Attorney General implies  
28 that the state agencies may have a “virtual veto” here, that argument is both unsupported by evidence

1 or facts germane to this case and is legally unpersuasive as discussed above. Indeed, as discussed  
2 herein, the Nebraska Attorney General argues too much by relying on these other formal procedures:  
3 if the Nebraska Attorney General is implying that its lawyers “routinely” obtain agency documents  
4 using legal procedures such as subpoenas, civil investigative demands, and public records requests,  
5 then that admission of a “routine” process may be viewed as constituting a legal right of access to  
6 the agencies’ documents upon demand. In any event, the Court need not reach that issue to find  
7 “control” on the record presented here. Ultimately, the Nebraska Attorney General’s argument  
8 about what may “routinely” happen in other (apparently adversarial) cases does not negate or inform  
9 what is actually happening in this case, on the record before the Court here.

10 The Nebraska Attorney General argues that, because Google sought documents from  
11 Nebraska state agencies by subpoena in connection with a case in the Eastern District of Virginia,  
12 that somehow suggests that state agencies should not be subject to party discovery here. [Dkt. 738-  
13 22 at 2 (citing *United States v. Google LLC*, 698 F. Supp. 3d 876 (E.D. Va. 2023)]. Apparently, the  
14 University of Nebraska at Omaha represented itself in responding to the subpoena in the *Google*  
15 case, while the Nebraska Department of Transportation was represented by the Nebraska Attorney  
16 General. The subpoenas issued in April 2023. [Dkts. 738-41 to -43]. A review of the docket from  
17 the *Google* Court shows that no motions to compel were filed and certainly none were decided prior  
18 to April 2023. *See United States v. Google LLC*, No. 23-cv-108, at Dkts. 1-167. The only discovery  
19 matters on that docket prior to April 2023 reflect stipulated and preliminary motions practice  
20 regarding the protective order, ESI protocol, and the discovery plan. *Id.* It is apparent that, in the  
21 circumstances of that case, Google chose not to pursue party discovery voluntarily, and instead  
22 tactically chose to seek documents from the state agencies by subpoena. There is no Order on the  
23 control issue decided by the *Google* Court. This Court declines the Nebraska Attorney General’s  
24 suggestion to follow that “same process” here, where (unlike *Google*) Meta has chosen to litigate  
25 this issue and (again unlike in *Google*) the Nebraska Attorney General has also chosen to litigate its  
26 opposition to the control issue. While the parties here could have attempted to negotiate this dispute  
27 to follow the non-litigated process in *Google*, there is nothing legally instructive or persuasive in  
28 the voluntary process followed by the parties in *Google* which informs the “control” issue here

(other than the fact that the parties in *Google* conserved both their and that Court’s resources by opting not to litigate the issue, unlike here).

Accordingly, it appears that under the statutory scheme each will be represented by the Nebraska Attorney General in this matter for discovery. Thus, because the Nebraska Attorney General appears likely to be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

## XXII. NEW JERSEY

In opposition to the control issue, the New Jersey Attorney General argues primarily that the New Jersey Attorney General is a separate entity and independent from the New Jersey agencies. [Dkt. 738-23 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) New Jersey agencies are proscriptively barred from obtaining counsel other than the New Jersey Attorney General without consent from the New Jersey Governor; and (2) the New Jersey Attorney General has acknowledged that it will definitely represent all but two of the identified agencies (and that it could represent the remaining two agencies). *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Children & Families, Department of Education, Department of Health, Department of Human Services, Department of the Treasury, Economic Development Authority, Governor’s Counsel on Mental Health Stigma, Office of the Governor, and Office of the Secretary of Higher Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the New Jersey Attorney General does have legal control, for purposes of discovery, over the identified New Jersey agencies. While the New Jersey Attorney General asserts its independence as a separate entity, this does not negate the legal and practical realities highlighted by Meta. Specifically, New Jersey agencies are barred from obtaining counsel other than the New Jersey Attorney General without the Governor’s consent, which firmly establishes the Attorney General as their primary legal representative.

Under New Jersey’s statutory scheme, the New Jersey Attorney General shall “[e]xamine and decide all legal matters submitted to him by the Governor or the Legislature and act for them in

any matter in which they may be interested, and shall exclusively attend to and control all litigation and controversies to which the State is a party or in which its rights and interests are involved[.]” N.J. Stat. § 52:17A-4(c). Additionally, the New Jersey Attorney General shall “[a]ct as the sole legal adviser, attorney or counsel[] . . . for all officers, departments, boards, bodies, commissions and instrumentalities of the State Government in all matters other than those requiring the performance of administrative functions entailing the enforcement, prosecution and hearing of issues as imposed by law upon them; and represent them in all proceedings or actions of any kind which may be brought for or against them in any court of this State[.]” N.J. Stat. § 52:17A-4(e).

Importantly, the New Jersey Attorney General’s arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the New Jersey agencies at issue here to employ or obtain counsel in this matter other than the Attorney General absent consent. [Dkt. 738-23 at 2]. Under New Jersey law, “[n]o special counsel shall be employed for the State or for or by any officer, department, board, body, commission or instrumentality of the State Government except by authority of the Attorney-General, and then only with the approval of the Governor, and provided that appropriations have been made therefor, unless the matter be of such an emergency and shall be so declared by the Governor.” N.J. Stat. § 52:17A-13. Indeed, the New Jersey Attorney General confirmed that its office will definitely represent all but two agencies at issue (and that it could represent the remaining two agencies) if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 36–37]. Accordingly, it appears that under the statutory scheme almost every agency at issue will definitely be represented by the New Jersey Attorney General in this matter for discovery. With regard to the the New Jersey Economic Development Authority and the New Jersey Office of the Governor, the New Jersey Attorney General’s indication that it could represent them is not explained in the context of the statutory scheme. Here, there has been no evidence that the New Jersey Attorney General has authorized separate counsel, no indication that the Governor’s approval has been sought or granted, and no evidence of any appropriations having been made for separate counsel. *See* N.J. Stat. § 52:17A-4(e). As discussed, no separate counsel has appeared for any New Jersey state agencies, despite the fact that litigation holds have been issued and the agencies have had notice of the pendency of

discovery in this matter for some time. Accordingly, based on the record before the Court, the New Jersey Attorney General will likely represent these two other state agencies for purposes of discovery.

Relatedly, the New Jersey Attorney General has taken the position that the New Jersey agencies do not share confidential information and do not “engage in the same functions, or have the same management teams.” [Dkt. 738-23 at 2]. That argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery.

By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. The New Jersey Attorney General’s reliance on the separation between these agencies and the Department of Law and Public Safety, and the alleged lack of “administrative control and oversight” is thus unpersuasive. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in administrative or managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. The New Jersey Attorney General’s arguments erroneously conflate the legal control issue with “administrative control” or “generalized control” over each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.



Further, there is no statutory, legal, or administrative rule cited which prohibits the New Jersey Attorney General from accessing the documents of the state agencies at issue for purposes of discovery. The New Jersey Attorney General’s argument that there is a lack of “unfettered access to records of every agency” and reference in general to agencies’ records laws is unpersuasive on the issue of “control” for purposes of discovery. [Dkt. 738-23 at 2]. First, the “control” test for Rule 34 does not require unbounded, fully discretionary access to records of every agency at all times under every conceivable set of circumstances – the question rather is whether there is a legal right to access upon demand the documents at issue in this case. Whether or not Meta has failed to show “unfettered access” of every agency’s records does not answer the “control” question for the specific agencies’ documents at issue here for Rule 34.

Second, the argument based on agencies’ records laws is irrelevant for the same reasons discussed herein with regard to similar arguments based on confidentiality laws of other states. The only statute actually cited by the New Jersey Attorney General relates to confidentiality of records of child abuse reports within the New Jersey Department of Children and Families. [Dkt. 738-23 at 2 (citing N.J. Stat. Ann. § 9:6-8.10a)]. As an initial matter, that statute is irrelevant to any of the other agencies at issue and poses no barriers to the New Jersey Attorney General’s access to those other agencies’ documents. Further, that statute is limited to reports, investigations, and findings of child abuse made pursuant to three specific New Jersey statutes, and thus poses no restriction on an attorney accessing other documents of the New Jersey Department of Children and Families. Because the issues being litigated in this Multi-District Litigation do not focus on specific reports or investigations of instances of child abuse in New Jersey, the cited statute appears to be irrelevant to the scope of discovery in this case. More importantly, the cited statute does not bar access to documents by an attorney representing the Department of Children and Families. Contrary to the New Jersey Attorney General’s arguments, that statute expressly states that these child abuse records “may be disclosed” in numerous listed circumstances, including disclosure to a “federal, State, or local government entity, to the extent necessary for such entity to carry out its responsibilities under law to protect children from abuse and neglect.” N.J. Stat. Ann. § 9:6-8.10a(1)(b)(20). Here, the Multistate Complaint (of which the New Jersey Attorney General is a party) asserts in multiple

sections that Meta has harmed youth. *See, e.g.*, Multistate Complaint at ¶¶ 1-2 (Meta “has ignored the sweeping damage these Platforms have caused to the mental and physical health of our nation’s youth . . . . Meta designed and deployed harmful and psychologically manipulative product features to induce young users’ compulsive and extended Platform use[.]”). Facially, the cited New Jersey records statute would appear to grant an express legal right for the New Jersey Attorney General to access these records from the Department of Children and Families, to the extent those records were necessary to carry out its responsibilities to protect children from abuse and neglect. On this basis alone, the Court finds that the cited statute, N.J. Stat. Ann. § 9:6-8.10a, satisfies *Citric Acid*’s requirement of a legal right to access those documents of that agency by the New Jersey Attorney General. For purposes of establishing “legal control” over documents, “[d]ecisions from within this circuit have noted the importance of a legal right to access documents created by *statute*, affiliation or employment.” *In re Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. at 170 (emphasis added) (finding “legal control” and ordering party to obtain and produce transcript not within current possession where federal regulation, 17 C.F.R. § 203.6, grants legal right to ask for and obtain transcript of testimony from SEC); *see also In re ATM Fee Antitrust Litig.*, 233 F.R.D. at 545 (finding “a bank holding company necessarily controls its subsidiary banks” and thus has “legal control” of documents of bank by virtue of the Bank Holding Company Act, 12 U.S.C. § 1841(a)(1)).

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the Attorney General, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. Here, the New Jersey Attorney General admits that “to the extent the Attorney General has any ‘control’ over a listed state

agency, it is exclusively in the attorney-client context.” [Dkt. 738-18 at 2]. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

Further, the Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies. *See* Dkt. 1031-5. None of these state agencies are allowed to employ legal counsel other than the New Jersey Attorney General and thus by statute each must be represented by the New Jersey Attorney General in this matter for discovery. *See* N.J. Stat. § 52:17A-4(c). This arrangement indicates strongly that the state Attorney General, in fulfilling its role as chief legal advisor, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies. Therefore, the Court concludes that the New Jersey Attorney General has legal control, for the purposes of discovery, over the documents held by the New Jersey agencies listed by Meta, including in particular the three agencies recently listed in the intent to issue subpoenas.

Instructive on the “control” issue is the New Jersey district court opinion in *Love v. NJ Dep’t of Corr.*, No. 2:15-CV-4404-SDW-SCM, 2017 WL 3477864 (D.N.J. Aug. 11, 2017), *opinion clarified sub nom. Love v. New Jersey Dep’t of Corr., No. 15CV4404 (SDW)(SCM)*, 2017 WL 4842379 (D.N.J. Oct. 26, 2017). In *Love*, the plaintiff sued several individual officers of a New Jersey state prison and served document requests on each of them. The named defendants, all employees of the New Jersey Department of Corrections and all represented by the New Jersey Attorney General, objected and argued that they lacked control over the documents of the Department of Corrections. The *Love* Court took notice “that the Attorney General is obligated to defend State employees against civil claims; and anytime a defense is provided, such as here, ‘the State shall provide indemnification for the State Employee.’ Therefore, the Court finds that State has a significant stake in the outcome of this suit and that Mr. Love has met his burden to prove that the Northern State Officers have ‘control’, albeit through their attorney, over the records and

information at-issue.” *Id.* at \*6. As in *Love*, here the New Jersey Attorney General both represents itself and is obligated to represent the state agencies at issue, and the State of New Jersey has a significant stake in the outcome of this Multi-District Litigation given that the Multistate Complaint expressly states that “[t]his action is in the public interest of the Filing States.” *See* Multistate Complaint at ¶ 12.

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, New Jersey is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that New Jersey was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the New Jersey Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

### XXIII. NEW YORK

In opposition to the control issue, the New York Attorney General argues primarily the following factors: (1) the New York Attorney General is a separate entity and independent from the New York agencies; and (2) the New York Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-24 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) with exceptions not particularly relevant here, the New

York Attorney General must act as counsel for the New York agencies, and (2) nothing in New York law prohibits the New York Attorney General from accessing agency documents. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Council on Children and Families, Department of Education, Department of Health, Department of State, Higher Education Services Corporation, Office of Children and Family Services, Office of Mental Health, Office of the Governor, and State Division of the Budget. *Id.* Meta states that it has agreed not to seek party discovery from the Empire State Development Corporation, and therefore, the Court **DENIES** Meta’s motion with regard to that agency. *Id.* at 3 n.2.

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the New York Attorney General does have legal control, for purposes of discovery, over the listed New York agencies (excluding the Empire State Development Corporation, as discussed above). While the New York Attorney General is a separate entity and while the New York Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the New York General will act as the remaining agencies’ counsel.

The statutory scheme in New York requires that the New York Attorney General “[p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state[.]” N.Y. Exec. Law § 63(1).

The New York Attorney General does not cite to any statutory or legal prohibition on the New York Attorney General’s representing the state agencies in this matter for purposes of discovery. Indeed, the New York Attorney General confirmed that its office could represent the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 21]. Accordingly, it appears that under the statutory scheme each agency will be represented by the New York Attorney General in this matter for discovery.

Importantly, the New York Attorney General’s arguments do not negate the fact that all of the New York agencies at issue here must notify the New York Attorney General if any property or

1 interest of the state must be defended: “[n]o action or proceeding affecting the property or interests  
2 of the state shall be instituted, defended or conducted by any department, bureau, board, council,  
3 officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him  
4 of the said action or proceeding, the nature and purpose thereof, so that he may participate or join  
5 therein if in his opinion the interests of the state so warrant.” N.Y. Exec. Law § 63(1). This  
6 arrangement indicates strongly that the New York Attorney General, in fulfilling its statutory role  
7 for the state agencies, would necessarily and inherently have access to and control over the necessary  
8 documents for effective legal representation of these state agencies.

9 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement  
10 organization, the attorney general, is a party to the case while also acting as counsel for a third party.  
11 However, this would not be the first time that a legal services provider, as counsel for a party, is  
12 found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018  
13 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and  
14 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . .  
15 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as  
16 to responsive materials over which Salas and his law firm had possession, custody or control.”).  
17 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over  
18 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding  
19 broadly that there must be a finding of a legal right of access to and thus control over third party  
20 client documents in every case involving a legal services provider as a party; rather, under the  
21 particular facts here, and under the totality of circumstances viewed in light of applicable legal  
22 standards, the Court finds that control exists here.

23 The New York Attorney General’s role as counsel for the agencies at issue inherently  
24 involves obtaining necessary documents for effective representation in litigation. In acting as  
25 counsel, the New York Attorney General would necessarily have access to and thus control over the  
26 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at  
27 \*5–6 (finding state Attorney General has control over agency documents “based on his broad  
28 statutory and common law powers to control and manage legal affairs on behalf of state agencies,



1 has a legal right to obtain responsive documents from the state agencies referenced in the  
2 Complaint”).

3 Further, the New York Attorney General argues that the New York Attorney General is a  
4 separate and distinct elected entity with separate duties and responsibilities. Dkt. 738-24 at 2 (“The  
5 [New York Attorney General] NYAG is an independently-elected official, and unlike almost all  
6 other executive branch officers, including the heads of the state entities Meta identified, does not  
7 necessarily act pursuant to the directives of the [New York] Governor.”). However, this argument  
8 misapprehends the “legal control” test for documents – the issue is not simply whether one entity is  
9 under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary  
10 relationship), and not simply whether the two entities are legally separate (such as two different and  
11 separately incorporated entities), but rather whether there is a legal right to obtain the documents as  
12 explained by *Citric Acid*. “‘The control analysis for Rule 34 purposes does not require the party to  
13 have actual managerial power over the foreign corporation, but rather that there be close  
14 coordination between them.’” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-  
15 client relationship between the state Attorney General and the state agencies (a relationship  
16 mandated by state law) necessitates close coordination. While operational control may be a factual  
17 situation which demonstrates a legal right to obtain the documents, the absence of such “executive  
18 or functional control” is not determinative for evaluating “control” for purposes of discovery. By  
19 definition, the “legal control” issue for discovery arises when there are two legally distinct or  
20 separate entities – otherwise, if only one entity were involved, there would be no dispute that party  
21 discovery covered that one entity. As discussed above, courts have found “control” for purposes of  
22 discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary  
23 having control over the documents of a parent corporation, or an individual government officer  
24 having control over the documents of an entire agency.

25 Relatedly, the New York Attorney General argues that “[s]ome pre-suit [New York Attorney  
26 General] communications with such entities, therefore, may be privileged. The [New York Attorney  
27 General] does not, however, represent any of the state entities Meta has identified in this litigation,  
28 so no pre-suit communications arising out of this litigation are attorney-client privileged.” [Dkt.

738-24 at 2]. That statement, however, is silent as to (and thus appears artfully drafted to leave open the possibility) whether the New York Attorney General will assert privilege with respect to post-suit communications. The Court rejects the New York Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege for pre-suit communications, while apparently attempting to preserve the ability to assert the privilege applies to post-suit communications. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. To the extent the New York Attorney General implies its intention to assert that the attorney-client privilege would apply to communications between the New York Attorney General’s office and the agencies at issue, that further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

The New York Attorney General’s reliance on *New York ex rel. Boardman v. Nat’l R.R. Passenger Corp.*, 233 F.R.D. 259, 263 (N.D.N.Y. 2006) [hereinafter *Boardman*], does not dictate a different result. [Dkt. 738-24 at 2]. The *Boardman* Court recognized that “control in the context of discovery is to be broadly construed.” *Id.* at 267–68. The *Boardman* Court properly recognized that “[t]he burden of establishing control over the documents being sought rests with the demanding party.” *Id.* Critically, the finding of lack of control by one New York agency over the documents of another agency resulted from an express failure by the moving party (Amtrak) to meet its burden: “Amtrak’s contention that [state agency] DOT has possession, custody, and control of [second state agency] OSC’s records **is supported by nothing more than hypotheses.**” *Id.* (emphasis added). Here, by contrast, the record submitted to the Court is not mere hypotheses, as evident from the extended discussion in this Order. To the extent the New York Attorney General attempts to extrapolate from *Boardman* a general rule that no state agency can ever have control over the documents of another state agency, that argument is belied by *Boardman* itself: “The determination of control is often fact specific and thus generalizations, as [*Compagnie Francaise d’Assurance*

*Pour le Com. Exterieur*’s pronouncement seems to have done, are difficult to apply across the board.” *Id.* at 267 (citing *Compagnie Francaise d’Assurance Pour le Com. Exterieur*, 105 F.R.D. 16).

The fact that several other New York courts have found a state agency has control over the documents over another agency for purposes of discovery confirms that the issue of “control” is often case and fact specific. *See, e.g., Compagnie Francaise d’Assurance Pour le Com. Exterieur*, 105 F.R.D. at 35; *see also In re Opioid Litigation*, No. 400000/2017, 2019 WL 4120096, at \*1 (N.Y. Sup. Ct. Aug. 14, 2019) (finding control and distinguishing *Boardman* “easily”); *see also Gross v. Lunduski*, 304 F.R.D. 136, 141–44 (W.D.N.Y. 2014) (distinguishing *Boardman* and finding named defendant, individual corrections officer, has “control” over documents of N.Y. Department of Correctional and Community Services in part because New York State Attorney General was representing both defendant and agency); *see also Guillory v. Skelly*, No. 12-CV-00847S F, 2014 WL 4542468, at \*8–9 (W.D.N.Y. Sept. 11, 2014) (distinguishing *Boardman* and finding named defendants, individual corrections officers, have “control” over documents of N.Y. Department of Correctional and Community Services); *see also Siano Enders v. Boone*, No. 1:19-CV-948 (BKS/CFH), 2021 WL 3471558, at \*3-4 (N.D.N.Y. Aug. 6, 2021) (finding named defendants, individual retired employees of N.Y. agency, have control over documents of their former employer-agency); *cf. also United States v. UBS Sec. LLC*, No. 118CV6369RPKPK, 2020 WL 7062789, at \*4–7 (E.D.N.Y. Nov. 30, 2020) (finding that named party, the United States, has control over documents of agencies (HUD and Treasury)); *cf. also Loc. 3621, EMS Officers Union, DC-37, AFSCME, AFL-CIO v. City of New York*, No. 18CV4476LJLJW, 2023 WL 8804257, at \*11 (S.D.N.Y. Dec. 30, 2023) (finding that named party, City of New York, has control over documents of city agencies (NYCAPS, DCAS, Fire Department of New York, “or any other City department or agency”)).

Therefore, the Court concludes that the New York Attorney General has legal control, for the purposes of discovery, over the documents held by the New York agencies listed by Meta.

#### XXIV. NORTH CAROLINA

In opposition to the control issue, the North Carolina Attorney General argues primarily the

following factors: (1) the North Carolina Attorney General is a separate entity and independent from the North Carolina agencies; (2) the heads of North Carolina agencies are statutorily responsible for the “legal custody of all books, papers, documents and other records of the department;” and (3) the North Carolina Attorney General is not authorized to make decisions in areas which have been specifically delegated to a designated department. [Dkt. 738-25 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) in general the North Carolina Attorney General is required to represent all state agencies, and (2) North Carolina agencies are proscriptively barred from obtaining counsel other than the North Carolina Attorney General, without consent from the North Carolina Attorney General. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Commerce, Department of Health and Human Services, Department of Public Instruction, Office of Governor, and Office of State Budget and Management. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the North Carolina Attorney General has legal control, for purposes of discovery, over the listed North Carolina agencies. While the North Carolina Attorney General is a separate entity from the state agencies, this does not outweigh the requirement that the North Carolina Attorney General will act as the agencies’ counsel and will thus have access to the documents.

The statutory scheme in North Carolina requires the North Carolina Attorney General “[t]o represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.” N.C. Gen. Stat. § 114-2. More importantly, North Carolina law prohibits state agencies from employing separate counsel (subject to an exception not evident here): “No department, officer, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ private counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised him . . . that it is impracticable for the Attorney General to render the legal services.” N.C. Gen. Stat. § 147-17. There is nothing in the North Carolina Attorney General’s submissions to this Court indicating that

the North Carolina Attorney General has advised the Governor that representing the agencies is impracticable here, and there is nothing in the record to indicate that the Governor has approved separate counsel being retained by the state agencies. And given the circumstances of this case there is no basis to even suspect that the North Carolina Attorney General has a conflict of interest with any of the listed state agencies in relation to this Multi-District Litigation. Further, as noted, no separate counsel has appeared for any state agencies in this case.

Indeed, the North Carolina Attorney General confirmed that its office could represent all but one of the listed agencies if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 22]. And as to that one agency (the North Carolina Department of Commerce), there is nothing in the record to indicate how or why that agency would be permitted to retain separate counsel for this case under § 147-17, and the North Carolina Attorney General’s briefing does not adequately explain why they represent confusingly to the Court that they would not represent that agency. When evaluating this issue, the Court determines that the plain language of the statute should control, as opposed to the unexplained statement of counsel. The statutory scheme in North Carolina makes clear the North Carolina legislature’s strong preference that state agencies be represented by the North Carolina Attorney General. This arrangement indicates strongly that the North Carolina Attorney General, in fulfilling its statutory role to carry out its duties to represent all agencies, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies.

Further, there is no statutory, legal, or administrative rule cited which prohibits the North Carolina Attorney General from accessing the documents of the state agencies at issue. The North Carolina Attorney General argues that “agency documents, not all of which are public records, are under the legal control of separately elected constitutional officers and each agency has their own separate processes for responding to public records requests[.]” [Dkt. 738-25 at 2]. This argument is based on an incorrect assumption that “public records” laws and processes are the only way in which the North Carolina Attorney General can obtain documents from the state agencies when they are clients of the lawyers of that office. A public records law does not amount to a statutory or legal prohibition on the North Carolina Attorney General from accessing the documents in the scope of

its representation of the agencies as clients. If the North Carolina Attorney General’s supposition that, every time the North Carolina Attorney General seeks documents from state agencies, a public records Act requests would be routine and necessary, then the logical conclusion is that the public records law would be a routinely used legal right to access those documents and records of the agency subject to the Act. At least one court has found that a state “public records” Freedom of Information Act constitutes a legal right to access documents from an agency for purposes of “control” under Rule 34. *See Flagg*, 252 F.R.D. at 355–57 (“Because at least some of the text messages maintained by [(third party)] SkyTel are ‘public records’ within the meaning of Michigan’s FOIA, it would be problematic, to say the least, to conclude that the [named defendant] City lacks a legal right to obtain these records as necessary to discharge its statutory duty of disclosure.”). However, the North Carolina Attorney General cites no law supporting the view that a public records request is the only way for the North Carolina Attorney General to get documents from state agencies when they are clients. [Dkt. 738-25 at 2]. If the North Carolina Attorney General were correct, then the North Carolina Attorney General would have to submit a public records request every time the lawyers of that office were representing a state agency, to get documents from their own client – which is not merely impractical but also contrary to the principles of effective legal representation. As counsel, the North Carolina Attorney General will have the normal type of direct access to the necessary documents from its own clients, without resorting to public channels, ensuring efficient and comprehensive legal support for the agencies involved consistent with the ethical obligations and applicable rules of professional conduct. The North Carolina open records law is not an impediment to that access, because public records requests apply to records which are to be produced for public inspection (and not for purposes of litigation such as this case in which there is a Protective Order limiting public availability of confidential documents).

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena



recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The North Carolina Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the North Carolina Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”).

To the extent the North Carolina Attorney General argues that the North Carolina Attorney General is a “separate principal departments headed by the independently elected Governor,” *dk.* 738-25 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may

1 be a factual situation which demonstrates a legal right to obtain the documents, the absence of such  
2 “executive or functional control” is not determinative for evaluating “control” for purposes of  
3 discovery. By definition, the “legal control” issue for discovery arises when there are two legally  
4 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute  
5 that party discovery covered that one entity. As discussed above, courts have found “control” for  
6 purposes of discovery where a party is clearly not in managerial control over the third-party, such  
7 as a subsidiary having control over the documents of a parent corporation, or an individual  
8 government officer having control over the documents of an entire agency. Thus, arguing that the  
9 North Carolina Attorney General “does not represent any state agencies in this action and brings  
10 this action in the public interest under North Carolina’s consumer protection laws[,]” dkt. 738-25 at  
11 2, is simply re-stating the issue to be decided, and not determinative of the issue. The North Carolina  
12 Attorney General’s arguments erroneously conflate the legal control issue with “operational  
13 control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of  
14 legal control of the documents for purposes of discovery.

15 The Court is not persuaded by the North Carolina Attorney General’s argument that North  
16 Carolina law does not authorize the Attorney General “to make decisions in areas which have been  
17 specifically delegated to a designated department,” dkt. 738-25 at 2 (citing *Tice v. Dep’t. of Transp.*,  
18 312 S.E2d 241, 245 (N.C. Ct. App. 1984)). That argument does not mandate a different result over  
19 “control” for purposes of discovery. Nothing in North Carolina law “specifically delegates” to the  
20 listed state agencies the handling of discovery issues surrounding the production of documents in a  
21 civil matter. The fact that agencies may have their own internal procedures for handling public  
22 records requests is irrelevant, as noted above, because such public records procedures are not the  
23 only method by which the North Carolina Attorney General can obtain documents from state  
24 agencies in the course of representing them in litigation. Indeed, under North Carolina law, because  
25 the North Carolina Attorney General is specifically mandated to represent the state agencies in  
26 litigation, if anything the cited *Tice* case supports the view that handling this discovery issue is  
27 properly within the legislatively-mandated scope of duties of the North Carolina Attorney General.  
28 To the extent the *Tice* opinion reflects the concept that, for policy and operational duties, each

agency is structurally independent, again that is simply another irrelevant reiteration and confusion of “managerial power” with “control” for purposes of discovery.

Furthermore, at least one other federal court has previously found that the North Carolina Attorney General has legal control over North Carolina state agency materials. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with the applicable legal standards discussed above and in light of the facts and circumstances presented here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly consistent with, and to that extent further persuasively supports, the conclusion here with regard to the North Carolina Attorney General’s having control with regard to documents of the state agencies at issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the objecting states including North Carolina, this Court is disappointed that the North Carolina Attorney General and Meta here were unable to reach a negotiated resolution of this dispute, which other states were able to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

Therefore, the Court concludes that the North Carolina Attorney General has legal control, for the purposes of discovery, over the documents held by the North Carolina agencies listed by Meta, including in particular the three agencies recently listed in the intent to issue subpoenas.

## **XXV. NORTH DAKOTA**

In opposition to the control issue, the North Dakota Attorney General argues primarily the following factors: (1) the North Dakota Attorney General is a separate entity and independent from the North Dakota agencies; (2) the North Dakota Attorney Generals powers are specifically determined by the legislature and prescribed by law; (3) the North Dakota agencies’ ability to share information with other agencies or access records of other agencies is control by state law; (4) the North Dakota Attorney General does not seek relief on behalf of North Dakota agencies; and (5) the North Dakota Attorney General is not automatically required to represent North Dakota agencies.

[Dkt. 738-26 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) North Dakota agencies are proscriptively barred from obtaining counsel other than the North Dakota Attorney General, without consent from the North Dakota Attorney General; and (2) the North Dakota Attorney General is “expressly allowed to ‘access and examine any record under the control of the state board of higher education’ in the course of representing that board.” *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Department of Commerce, Department of Health and Human Services, Department of Public Instruction, Department of Education Standards and Practices Board, Office of Management and Budget, and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the North Dakota Attorney General has legal control, for purposes of discovery, over the listed North Dakota agencies. While no specific statute exists that explicitly grants the North Dakota Attorney General access to the documents from the North Dakota agencies, the North Dakota Attorney General will act as counsel to these state agencies, subject to such request which appears certain based on the record, and will thus have control over the documents. The Court repeatedly asked the state Attorneys General whether they have spoken with the agencies at issue, and they chose not to. No separate counsel has entered appearance for these state agencies. Accordingly, the record before the Court is that all of the agencies at issue will be represented by the North Dakota Attorney General.

The statutory scheme in North Dakota requires that the North Dakota Attorney General shall “[a]pppear and defend all actions and proceedings against any state officer in the attorney general’s official capacity in any of the courts of this state or of the United States.” N.D. Cent. Code § 54-12-01. Indeed, the North Dakota Attorney General confirmed that its office could represent all of the listed agencies if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 22]. Importantly, the North Dakota Attorney General’s arguments do not negate the fact that all of the North Dakota agencies at issue here are barred by North Dakota law from obtaining counsel other than the North Dakota Attorney General: “[a] state . . . agency may not employ legal counsel,

and no person may act as legal counsel in any matter, action, or proceeding in which the state . . . agency is interested or is a party, except upon written appointment by the attorney general.” N.D. Cent. Code § 54-12-08. This statutory scheme makes plain the North Dakota Legislature’s strong preference that the North Dakota Attorney General will represent state agencies in cases such as this Multi-District Litigation. As a result, this arrangement indicates strongly that the North Dakota Attorney General, in fulfilling its statutory role to appear and defend all action for the state agencies, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies. Therefore, the Court concludes that the North Dakota Attorney General has legal control, for the purposes of discovery, over the documents held by the North Dakota agencies listed by Meta, including in particular the three agencies recently listed in the intent to issue subpoenas.

Further, there is no statutory, legal, or administrative rule cited which prohibits the North Dakota Attorney General from accessing the documents of the state agencies at issue. Meta argues that North Dakota law specifically grants the North Dakota Attorney General the statutory right to “access and examine any record under the control of the state board of higher education” when appointed to represent that agency or an institution under the control of the state board of higher education. [Dkt. 738-26 at 3 (citing N.D. Cent. Code § 54-12-08(4))]. However, the North Dakota State Board of Higher Education is in charge of the university system in North Dakota and does not appear to be one of the agencies at issue in this case for discovery. Accordingly, Meta’s reliance on the cited statute is irrelevant and fails to show a legal right of access for the documents of the agencies at issue here.

The North Dakota Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation, as explained above. In acting as counsel, the North Dakota Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state

agencies referenced in the Complaint”).

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization (the attorney general) is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The North Dakota Attorney General argues that its powers are conferred by the North Dakota Constitution, and because the North Dakota Constitution has not explicitly conferred access to agency documents, the North Dakota Attorney General does not have legal control over the documents. [Dkt. 738-26 at 2]. However, the North Dakota Attorney General does not cite to any statutory or legal prohibition on the North Dakota Attorney General’s representing the state agencies for purposes of discovery (and accessing their clients’ documents in the course of such representation). To the extent the North Dakota Attorney General argues that the North Dakota Attorney General separate and distinct elected entity with separate duties and responsibilities, *see* dkt. 738-26 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. . “The control analysis for Rule



34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the North Dakota Attorney General “brought this action in a law enforcement capacity, pursuant to statutory authority, to enjoin unlawful practices. The [North Dakota Attorney General] alone decides whether to bring such an action[,]” dkt. 738-26 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The North Dakota Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Relatedly, the North Dakota Attorney General has taken the position that communications between the North Dakota Attorney General and these state agencies would be covered by the attorney-client privilege. Dkt. 738-26 at 2 (“Communications between other [North Dakota Attorney General’s] divisions and client state agencies may be privileged if it is an active litigation record, attorney work product, or attorney consultation.”). To the extent the North Dakota Attorney General has attempted to subdivide its own office between the team litigating this case and other “agency counsel sections” in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts of the state North Dakota General’s office but not other sub-teams, that argument is not supported by citation to law and is contrary to the weight of law. The scope of

attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that no courts support North Dakota’s argument that different individual lawyers in the North Dakota Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the North Dakota Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the “division” of attorneys currently working

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on this case, while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in other “divisions” of the North Dakota Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. The fact that the North Dakota Attorney General is attempting to preserve the ability to assert the attorney-client privilege between the North Dakota Attorney General’s office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Instructive on the control issue is the District of North Dakota’s opinion in *North Dakota v. United States*, No. 1:19-CV-150, 2021 WL 6278456 (D.N.D. Mar. 24, 2021). In that case, the State of North Dakota, represented by the North Dakota Attorney General, served document requests on the United States, and expressly argued that several federal agencies should be the subject of party discovery. *Id.* at \*2. The United States objected, taking positions strikingly similar to the North Dakota Attorney General in this Multi-District Litigation, and argued that North Dakota should seek documents from such listed agencies by subpoena under Rule 45 instead. *Id.* After reviewing multiple cases involving whether federal agencies should be subject to party discovery when the United States is the named party, the North Dakota district court held that while those precedents “all involved circumstances quite different from those of this case, each involved the United States as a party, and each followed the principle that the United States’ obligation to respond to discovery requests is not limited to an agency named in the action. This order need not, and therefore does not, consider whether North Dakota can recover for any acts of employees of agencies other than the USACE. Even if North Dakota’s recovery is limited to negligent acts of USACE employees, that would not foreclose North Dakota from seeking discovery from other federal agencies who possess relevant information.” *Id.* at \*4. It is noteworthy that, in *North Dakota v. United States*, the North Dakota Attorney General argued that government agencies should be subject to party

discovery when the sovereign is a named party and succeeded in that argument when seeking discovery from another sovereign. *See id.* at \*2–4. The fact that the North Dakota Attorney General is now arguing the exact opposite position, when its sovereign is a party and its agencies are the target of discovery, undercuts the persuasive force of the arguments presented. The analogous result in *North Dakota v. United States* supports the finding of “control” for purposes of discovery here.

Given the North Dakota federal court’s decision in the analogous *North Dakota v. United States* case (which the North Dakota Attorney General was involved in as counsel), this Court is disappointed that the North Dakota Attorney General and Meta were unable to reach a negotiated resolution of this dispute, which other states were able to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

Therefore, the Court concludes that the North Dakota Attorney General has legal control, for the purposes of discovery, over the documents held by the North Dakota agencies listed by Meta.

## XXVI. OHIO

In opposition to the control issue, the Ohio Attorney General’s primary substantive argument is that the Ohio Attorney General is a separate entity and independent from the Ohio agencies. [Dkt. 738-27 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) Ohio agencies are proscriptively barred from obtaining counsel other than the Ohio Attorney General; and (2) Ohio state law mandates that Ohio agencies furnish documents to the Ohio Attorney General. *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Department of Children and Youth, Department of Development, Department of Education & Workforce, Department of Health, Department of Higher Education, Department of Job and Family Services, Department of Mental Health & Addiction Services, Department of Youth Services, Office of Budget and Management, and Office of Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in

favor of a finding that the Ohio Attorney General does have legal control, for purposes of discovery, over the listed Ohio agencies. While the Ohio Attorney General is a separate entity, this does not outweigh the requirement that the Ohio Attorney General will act as the agencies’ counsel and that Ohio state law explicitly mandates that Ohio agencies furnish documents to the Ohio Attorney General.

There is no statutory, legal, or administrative rule cited which prohibits the Ohio Attorney General from accessing the documents of the state agencies at issue. To the contrary, “[p]ublic officers and their deputies, assistants, clerks, subordinates, and employees shall render and furnish to the attorney general, or to the attorney general’s designated representatives when so requested, all information and assistance in their possession or within their power.” Ohio Rev. Code § 1331.16(N). Unlike other states, the Ohio legislature explicitly created a legal right for the Ohio Attorney General to access state agencies’ documents. For purposes of establishing “legal control” over documents, “[d]ecisions from within this circuit have noted the importance of a legal right to access documents created by *statute*, affiliation or employment.” *In re Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. at 170 (emphasis added) (finding “legal control” and ordering party to obtain and produce transcript not within current possession where federal regulation, 17 C.F.R. § 203.6, grants legal right to ask for and obtain transcript of testimony from SEC); *see also In re ATM Fee Antitrust Litig.*, 233 F.R.D. at 545 (finding “a bank holding company necessarily controls its subsidiary banks” and thus has “legal control” of documents of bank by virtue of the Bank Holding Company Act, 12 U.S.C. § 1841(a)(1)). Thus, the cited statute expressly grants the Ohio Attorney General an explicit legal right to obtain and access these documents of the agencies at issue here. The Court thus finds that Ohio Rev. Code § 1331.16(N) directly satisfies *Citric Acid*’s requirement of a showing of a legal right to access the documents of the state agencies here.

Further, and as a separate reason for finding “control” here, the Court notes that the statutory framework in Ohio (like other States) requires that the Ohio Attorney General serve as counsel for the state agencies at issue. As discussed above, the nature of the attorney-client relationship in this action and under the facts here support a finding of “control” with respect to discovery of the state agencies’ documents.

First, the statutory scheme in Ohio requires that the Ohio Attorney General “is the chief law officer for the state and all its departments[.]” Ohio Rev. Code § 109.02. “[T]he attorney general is legal counsel for all state agencies.” *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 925 N.E.2d 641, 658 (Ohio Ct. App. 2009), *aff’d*, 941 N.E.2d 745 (Ohio 2010); *see also* *Northeast Ohio Coal. for Homeless & Serv. Emps. Int’l Union, Loc. 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006) (“Under Ohio Rev. Code Ann. § 109.02, the Attorney General is ‘the chief law officer for the state and all its departments’ and shall appear for the State in any tribunal in a case in which the state is a party when required by the governor or the general assembly. The Attorney General, then, is both the State’s chief legal officer and a representative of the people and the public interest[.]”). Indeed, the Ohio Attorney General confirmed that its office could represent the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 23–24]. Accordingly, it appears that under the statutory scheme each agency will be represented by the Ohio Attorney General in this matter for discovery because of the intended subpoenas.

There is no citation to any statutory or legal prohibition on the Ohio Attorney General’s representing the state agencies in this matter for purposes of discovery. Importantly, while the Ohio Attorney General certified that it “could” represent these agencies for purposes of discovery in this Multi-District Litigation, that statement must be viewed in light of the statutory scheme in Ohio which forbids all of the Ohio agencies at issue from obtaining other counsel: “no state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law.” Ohio Rev. Code § 109.02. This statutory scheme makes plain the Ohio Legislature’s mandate (and not mere preference) that the Ohio Attorney General will represent state agencies in cases such as this Multi-District Litigation. As a result, this arrangement indicates strongly that the Ohio Attorney General, in fulfilling its statutory role for the state agencies, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies, since the Ohio Attorney General’s office must have had a long and deep history of working with and representing these agencies in light of the legislative mandate in favor of representation.

The Ohio Attorney General’s role as counsel for the agencies at issue inherently involves



obtaining necessary documents for effective representation in litigation. In acting as counsel, the Ohio Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”).

Further, it is unavailing for the Ohio Attorney General to argue that the Ohio Attorney General is a separate and distinct elected entity with separate duties and responsibilities from these agencies. Dkt. 738-27 at 2. This argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. . ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency.

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is a party to the case while also acting as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have

control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

Relatedly, the Ohio Attorney General argues that “[t]here is a distinction between the attorneys from the Ohio Attorney General’s office who have filed this lawsuit – all of whom are assigned to the Consumer Protection Section within the office - and the attorneys from the same office who may be engaged in responding to subpoenas related to this lawsuit on behalf of their respective clients.” [Dkt. 738-27 at 2]. To the extent the Ohio Attorney General has attempted to subdivide its own office between the team litigating this case and other “agency counsel sections” in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts of the Ohio Attorney General’s office but not other sub-teams (and more surprisingly, argues that the privilege would be asserted as against attorneys in the Consumer Protection Section), that argument is not supported by citation to law and is contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we

should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. Here, there is no indication or evidence of any such ethical screening, and it is simply not realistic or credible to presume that lawyers in the Ohio Attorney General’s office representing these agencies for discovery in this Multi-District Litigation would fail to coordinate with the attorneys already involved in this Multi-District Litigation. It lacks even more credibility for the Ohio Attorney General to argue that the attorney-client privilege would be asserted to prevent such communications between lawyers in that same office where there is no basis to assume any adversity as between any of the state agencies and the State (a party to this case) or the Ohio Attorney General (also a party, as relator, in this case). This review of case law demonstrates that no courts support Ohio’s argument that different individual lawyers in the Ohio Attorney General’s office have *ex ante* separable, discrete attorney-client relationships which allow the privilege to be selectively asserted, even as against other lawyers in the Ohio Attorney General’s office.

The Ohio Attorney General’s citation to and reliance on *Monsanto* as support of the

“separate entities” and “constitutional structure” arguments is not persuasive. [Dkt. 738-27 at 2 (citing *State of Ohio v. Monsanto Co.*, Hamilton C.P. No. A1801237 (Ohio Ct. Common Pleas Dec 2, 2020)]. The *Monsanto* opinion is a state court opinion which does not discuss *Citric Acid*, does not apply the relevant federal precedent, and relies as legal support on another Ohio state court opinion on the lack of interchangeability of different Ohio agencies under Ohio state law. *Id.*

By contrast, instructive here is the Southern District of Ohio’s opinion in *Bivens v. Lisath*, No. 2:05-CV-0445, 2007 WL 2891416 (S.D. Ohio Sept. 28, 2007). In that civil rights case, an inmate sued various correctional officers and officers of an Ohio state prison, all of whom (as well as the non-party Ohio Department of Rehabilitation and Corrections) were represented by the Ohio Attorney General - which also apparently intervened in that case as a party as well. *Id.* The Court denied the request because “the documents which he [plaintiff] describes in his request (# 22) are documents which would appear to be under the possession or control of the defendants in this case. As a result, he need not subpoena those documents, but may simply request them through the normal discovery processes that are available to parties to litigation and identified in Federal Rules of Civil Procedure 26 through 37.” *Bivens*, 2007 WL 2891416, at \*6. In *Bivens*, despite the fact that the named individual defendant officers do not exercise executive or managerial oversight of the agency at issue, the Court found “control” for purposes of discovery. Just as in this Multi-District Litigation, in *Bivens* the Ohio Attorney General was both counsel to the named defendants, as well as the third-party agency, and was itself a party (as intervenor much like its status as relator party here). The analogous result in *Bivens* further supports the Court’s finding of “control” here.

Indeed, at least one other federal court has previously found that the Ohio Attorney General has legal control over Ohio state agency materials. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with the applicable legal standards discussed above and in light of the facts and circumstances presented here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly consistent with, and to that extent further persuasively supports, the conclusion here with regard to the Ohio Attorney General’s having control with regard to documents of the state agencies at issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the objecting states

including Ohio (which the Ohio Attorney General was involved in), and given the Ohio federal court’s decision finding control in the analogous *Bivens* case (which the Ohio Attorney General was involved in both as counsel and a party), this Court is disappointed that the Ohio Attorney General and Meta were unable to reach a negotiated resolution of this dispute, which other states were able to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent (such as *Generic Pharmaceuticals (II)* and *Bivens*) on the discovery issue at hand.

Therefore, the Court concludes that the Ohio Attorney General has legal control, for the purposes of discovery, over the documents held by the Ohio agencies listed by Meta.

## XXVII. OREGON

In opposition to the control issue, the Oregon Attorney General argues primarily the following factors: (1) the Oregon Attorney General is a separate entity and independent from the Oregon agencies; (2) the Oregon Attorney General’s powers extends as far as set forth by statute or Oregon common law and limited by statute or conferred upon some other official; and (3) the Oregon Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-28 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) that Oregon agencies are proscriptively barred from obtaining counsel other than the Oregon Attorney General, without consent from the Oregon Attorney General due to a conflict, and (2) that Oregon law affords the Oregon Attorney General “[f]ull charge and control of all the legal business” of state agencies. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Business Oregon, the Office of the Governor, Department of Administrative Services, Department of Consumer and Business Services, and Department of Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Oregon Attorney General does have legal control, for purposes of

discovery, over the listed Oregon agencies. While the Oregon Attorney General is a separate entity and while the Oregon Attorney General is acting pursuant to her statutory authority in bringing this action, this does not outweigh the requirement that the Oregon Attorney General will act as the agencies' counsel. The Oregon Attorney General's powers provide "full control" for rendering legal services for Oregon agencies. The Oregon Attorney General does not indicate any sort of limitation to such legal power conferred upon the office. Moreover, the fact that Oregon agencies are proscriptively barred from obtaining counsel other than the Oregon Attorney General (other than in situations involving a conflict) further reinforces the finding of control over the documents necessary for effective legal representation. Therefore, the Court concludes that the Oregon Attorney General has legal control, for the purposes of discovery, over the documents held by the Oregon agencies listed by Meta.

The statutory scheme in Oregon requires that the Oregon Attorney General have "[g]eneral control and supervision of all civil actions and legal proceedings in which the State of Oregon may be a party or may be interested[,]" and have "[f]ull charge and control of all the legal business of all departments, commissions and bureaus of the state, or of any office thereof, which requires the services of an attorney or counsel in order to protect the interests of the state." Or. Rev. Stat. § 180.220 (emphasis added). Indeed, the Oregon Attorney General confirmed that its office will definitely represent all of the Oregon agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 24]. Importantly, the Oregon Attorney General's arguments do not negate the fact that all of the Oregon agencies at issue here are barred by Oregon law from obtaining counsel other than the Oregon Attorney General: "No state officer, board, commission, or the head of a department or institution of the state shall employ or be represented *by any other counsel* or attorney at law." Or. Rev. Stat. § 180.220 (emphasis added). This statutory arrangement indicates strongly that the Oregon Legislature expressed its preference that the Oregon Attorney General, in fulfilling its statutory role for the state agencies, would exercise such "full control" over legal representation of agencies, which necessarily and inherently includes having access to and control over the necessary documents for effective legal representation of these state agencies.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Oregon



1 Attorney General from accessing the documents of the state agencies at issue. The Oregon Attorney  
2 General argues that “[t]here is no statute or case law that grants the Attorney General authority to  
3 compel another state agency to provide documents in a proceeding for which that agency is not a  
4 party.” [Dkt. 738-28 at 2]. However, the absence of an express statute granting access, by itself,  
5 does not amount to a legal prohibition for the Oregon Attorney General to access documents as part  
6 of its representation of the state agencies in this matter for purposes of discovery. Indeed, the  
7 plenary statutory phrasing that this Attorney General will have both “general control and  
8 supervision” over civil actions and “full charge and control” over “all the legal business” of the  
9 agencies can reasonably be interpreted to include access to the documents of these agencies when  
10 they are clients being represented or defended in a civil action.

11 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement  
12 organization (the attorney general) is both a party to the case while also acting or able to act as  
13 counsel for a third party. However, this would not be the first time that a legal services provider, as  
14 counsel for a party, is found to have control over third party documents for purposes of discovery.  
15 *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena  
16 recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida  
17 lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas  
18 to respond as to responsive materials over which Salas and his law firm had possession, custody or  
19 control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control  
20 over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not  
21 holding broadly that there must be a finding of a legal right of access to and thus control over third  
22 party client documents in every case involving a legal services provider as a party; rather, under the  
23 particular facts here, and under the totality of circumstances viewed in light of applicable legal  
24 standards, the Court finds that control exists here.

25 There is no citation to any statutory or legal prohibition on the Oregon Attorney General’s  
26 representing the state agencies in this matter for purposes of discovery. The Court recognizes that  
27 this is a somewhat unusual situation, in which a law enforcement organization, the attorney general,  
28 is both a party to the case while also acting as counsel for a third party. However, this would not be

1 the first time that a legal services provider, as counsel for a party, is found to have control over third  
2 party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas  
3 individually and his law firm, the subpoena recipients and defendants in this court, are counsel of  
4 record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production  
5 to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas  
6 and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general,  
7 an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL  
8 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of  
9 access to and thus control over third party client documents in every case involving a legal services  
10 provider as a party; rather, under the particular facts here, and under the totality of circumstances  
11 viewed in light of applicable legal standards, the Court finds that control exists here.

12 Relatedly, the Oregon Attorney General has taken the position that communications between  
13 the Oregon Attorney General and these state agencies “may include confidential communications  
14 protected by the attorney-client or common interest privileges.” Dkt. 738-28 at 2 (“The Attorney  
15 General would assert privilege for confidential communications between the Attorney General and  
16 any of the identified agencies if the responsive document contained privileged communications.”).  
17 To the extent the Oregon Attorney General has attempted to preserve the ability to assert that the  
18 privilege applies to communications between the Oregon Attorney General’s Office and these  
19 agencies (by using conditional phrasing such as “may”, such attempts support a finding of an  
20 attorney-client relationship and thus the kind of access that supports a finding of control for purposes  
21 of discovery. *Perez*, 2014 WL 1796661, at \*2 Assertion of the attorney-client privilege requires,  
22 as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

23 The Oregon Attorney General’s role as counsel for the agencies at issue inherently involves  
24 obtaining necessary documents for effective representation in litigation. In acting as counsel, the  
25 Oregon Attorney General would necessarily have access to and thus control over the relevant  
26 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6  
27 (finding state Attorney General has control over agency documents “based on his broad statutory  
28 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal

1 right to obtain responsive documents from the state agencies referenced in the Complaint”).

2 Further, the Oregon Attorney General argues that the Oregon Attorney General is a separate  
3 and distinct elected entity with separate duties and responsibilities. [Dkt. 738-28 at 2]. However,  
4 this argument misapprehends the “legal control” test for documents – the issue is not simply whether  
5 one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-  
6 subsidiary relationship), and not simply whether the two entities are legally separate (such as two  
7 different and separately incorporated entities), but rather whether there is a legal right to obtain the  
8 documents as explained by *Citric Acid*. While operational control may be a factual situation which  
9 demonstrates a legal right to obtain the documents, the absence of such “executive or functional  
10 control” is not determinative for evaluating “control” for purposes of discovery. By definition, the  
11 “legal control” issue for discovery arises when there are two legally distinct or separate entities –  
12 otherwise, if only one entity were involved, there would be no dispute that party discovery covered  
13 that one entity. Thus, arguing that the Oregon “Attorney General made the decision to pursue this  
14 action as a matter of policy, independently of the Governor and other agencies,” dkt. 738-28 at 2, is  
15 simply re-stating the issue to be decided, and not determinative of the issue. The Oregon Attorney  
16 General’s arguments erroneously conflate the legal control issue with “operational control” or  
17 “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control  
18 of the documents for purposes of discovery.

19 “The control analysis for Rule 34 purposes does not require the party to have actual  
20 managerial power over the foreign corporation, but rather that there be close coordination between  
21 them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship  
22 between the Oregon Attorney General and the state agencies (a relationship mandated by state law)  
23 necessitates close coordination. Therefore, the Court concludes that the Oregon Attorney General  
24 has legal control, for the purposes of discovery, over the documents held by the Oregon agencies  
25 listed by Meta, including in particular the three agencies recently listed in the intent to issue  
26 subpoenas.

27 Indeed, at least one other federal court has previously found that the Oregon Attorney  
28 General has legal control over Oregon state agency materials. *Generic Pharmaceuticals (II)*, 699

F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with the applicable legal standards discussed above and in light of the facts and circumstances presented here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly consistent with, and to that extent further persuasively supports, the conclusion here with regard to the Oregon Attorney General’s having control with regard to documents of the state agencies at issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the objecting states including Oregon, this Court is disappointed that the Oregon Attorney General and Meta were unable to reach a negotiated resolution of this dispute, which other states were able to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

#### XXVIII. PENNSYLVANIA

In opposition to the control issue, the Pennsylvania Attorney General argues primarily the following factors: (1) the Pennsylvania Attorney General is a separate entity and independent from the Pennsylvania agencies; (2) the Pennsylvania Attorney General can only access Pennsylvania agency documents when the Pennsylvania Attorney General is utilizing its investigatory powers; (3) the Pennsylvania Attorney General’s instant law suit is premised on harm done to Pennsylvania consumers and not the state; (4) the Pennsylvania Attorney General does not seek relief on behalf of the Pennsylvania agencies. [Dkt. 738-29 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) the Pennsylvania Attorney General must act as counsel for the Pennsylvania agencies; and (2) Pennsylvania law allows the Pennsylvania Attorney General to access Pennsylvania agency documents whenever necessary to carry out its functions. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Business Oregon, the Office of the Governor, Department of Administrative Services, Department of Consumer and Business Services, and Department of Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in

1 favor of a finding that the Pennsylvania Attorney General does have legal control, for purposes of  
2 discovery, over the listed Pennsylvania agencies. While the Pennsylvania Attorney General asserts  
3 that Pennsylvania agencies are independent, these arguments do not negate the fact that the Attorney  
4 General is the chief legal advisor for the state government. Further, as discussed below, the  
5 argument that the Pennsylvania Attorney General can only access agency documents for  
6 investigations is not persuasive.

7 Here, unlike in several other states, the Court finds that there is an express right for the  
8 Pennsylvania Attorney General to access state agencies' documents. For purposes of establishing  
9 "legal control" over documents, "[d]ecisions from within this circuit have noted the importance of  
10 a legal right to access documents created by *statute*, affiliation or employment." *In re Legato Sys.,*  
11 *Inc. Sec. Litig.*, 204 F.R.D. at 170 (emphasis added) (finding "legal control" and ordering party to  
12 obtain and produce transcript not within current possession where federal regulation, 17 C.F.R. §  
13 203.6, grants legal right to ask for and obtain transcript of testimony from SEC); *see also In re ATM*  
14 *Fee Antitrust Litig.*, 233 F.R.D. at 545 (finding "a bank holding company necessarily controls its  
15 subsidiary banks" and thus has "legal control" of documents of bank by virtue of the Bank Holding  
16 Company Act, 12 U.S.C. § 1841(a)(1)).

17 Here, there is an express statute granting the Pennsylvania Attorney General a legal right to  
18 access the documents and materials of the six state agencies. Under Pennsylvania law, the  
19 Pennsylvania Attorney General has the unfettered right to obtain documents from Pennsylvania state  
20 agencies. Specifically, Pennsylvania law provides that "[t]he office of Attorney General ***shall have***  
21 ***the right to access at all times to the books and papers of any Commonwealth agency*** necessary  
22 to carry out its duties under this act." 71 Pa. Stat. § 732-208 (emphasis added).

23 In opposing the arguments in favor of control, the Pennsylvania Attorney General argues  
24 that they have no legal right or ability to obtain documents from the state agencies, and that the state  
25 agencies could simply refuse to hand over documents to the Attorney General in response to the  
26 document requests. Despite the plain wording of the statute, the Pennsylvania Attorney General  
27 argues that this statute is limited only to situations in which the Pennsylvania Attorney General is  
28 investigating a particular state agency. [Dkt. 738-29 at 2]. That assertion is wrong as a matter of

law. First, there is no such express limitation in the text of the statute. The plain text of a statute controls its interpretation. *In re Path Network, Inc.*, 703 F. Supp. 3d 1046, 1068 (N.D. Cal. 2023) (citing *In re Zynga Priv. Litig.*, 750 F.3d 1098, 1105 (9th Cir. 2014); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). Second, the Pennsylvania Attorney General cites nothing in the surrounding text of the statutory scheme of the Act to indicate that the Pennsylvania legislature implicitly intended to limit the scope of the Pennsylvania Attorney General’s right to access agency papers only to direct investigations of those agencies by the state Attorneys General. *Smith v. Spizzirri*, 601 U.S. 472, 472 (2024) (rejecting party’s argument to interpret Section 3 of the Federal Arbitration Act because “respondents’ attempt to read ‘stay’ to include ‘dismiss’ cannot be squared with the surrounding statutory text”); *K Mart Corp.*, 486 U.S. at 291 (implicit limitations should not be read into a statute absent clear guidance from the rest of the Act or other compelling guidance from the legislature).

Further, the Pennsylvania Attorney General made exactly this same argument in another Multi-District Litigation involving a similar discovery dispute, and that court rejected this very same argument:

Pennsylvania also argues that the [Special Discovery Master’s Report and Recommendation] R&R incorrectly determined that the OAG [Office of Attorney General] had control over the state agency documents sought by Defendants because the OAG only has such power when it is either investigating potentially unlawful behavior by Commonwealth agencies or litigating claims on behalf of Commonwealth agencies. Neither is being done here. Pennsylvania argues that the Amended Fourth R&R effectively seeks to usurp the OAG’s investigative authority, and would have the result of making each Commonwealth agency a party subject to Rule 26 discovery in every litigation brought by or against the OAG. If Defendants want the documents, Pennsylvania argues, they must serve them on the agencies as part of third-party discovery, and Pennsylvania represents that the OAG has offered to facilitate that discovery process . . . . Pennsylvania statutes address the relationship between the Office of the Attorney General and Commonwealth agencies with regard to the right to obtain documents. The key Pennsylvania statute, Section 208 of the Commonwealth Attorneys Act, provides in full that “[t]he Office of Attorney General shall have the right to access at all times to the books and papers of any Commonwealth agency necessary to carry out his duties under this act.” The Pennsylvania Supreme Court has held that Section 208:

“lists only one condition on the mandate of production: the material sought must be ‘necessary’ for execution of the OAG’s duties. We



recognize that the OAG has a broad array of duties involving Commonwealth agencies beyond criminal investigations, and that the [statute] is of correspondingly broad scope. Nevertheless the authorization remains qualified only by what is ‘necessary.’”

Although the Pennsylvania Supreme Court was ruling in the context of a grand jury investigation of a Commonwealth agency, the Court expressly affirmed that the statute is a broad one that extends beyond criminal investigations, qualified only by what is “necessary.” Because Pennsylvania has put into this suit the relevance of documents from the agencies that paid for generic drugs, it is necessary to its duties in complying with the Federal Rules of Civil Procedure in the litigation of the MDL, and the OAG therefore has access to the documents under Pennsylvania law.

*Generic Pharmaceuticals (I)*, 571 F. Supp. 3d at 410–11 (quoting *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 216 (Pa. 2014)).

Here, the Pennsylvania Attorney General filed suit against Meta and the prosecution of this matter is, by definition, one of the Attorney General’s duties. Responding to discovery is a necessary part of litigating this case, which the Pennsylvania Attorney General chose to initiate. Obtaining documents in order to respond to discovery requests is necessary to accomplish the Attorney General’s duties in this case. Meta asserts that the documents sought from these agencies are relevant to (or at the very least, within the scope of discovery for) the issues disputed in this Multi-District Litigation, and the state Attorney General’s make no argument that the documents are irrelevant to the case.

The fact that the Pennsylvania Attorney General is not seeking civil penalties, but is instead asserting harm to Pennsylvania consumers, is not dispositive of whether the documents are necessary for the Pennsylvania Attorney General to carry out its duties. [Dkt. 738-29 at 2]. To the extent the Pennsylvania agencies have relevant, responsive documents concerning the alleged harms to Pennsylvania consumers, the Pennsylvania Attorney General has by definition put those issues and documents relevant to such issues into this suit. And here, as in the *Generic Pharmaceuticals (I)* Multi-District Litigation, these agency documents are necessary for the Pennsylvania Attorney General’s duties in complying with the Federal Rules of Civil Procedure in this Multi-District Litigation. 71 Pa. Stat. § 732-208 (“[t]he office of Attorney General shall have the right to access at all times to the books and papers of *any Commonwealth agency necessary to carry out its duties under this act.*”) (emphasis added).

Further, Pennsylvania law mandates that the Pennsylvania “Attorney General *shall represent* the Commonwealth and *all Commonwealth agencies*.” 71 Pa. Stat. § 732-204 (emphasis added). Under Pennsylvania law, the Pennsylvania Attorney General’s office will necessarily represent these state agencies in responding to Meta’s discovery in this matter (regardless of whether the discovery is pursued procedurally under Rule 34 or under Rule 45), and thus the Pennsylvania Attorney General has an express statutory right under Pennsylvania law to obtain documents from these state agencies upon demand. The Court finds that searching for and producing relevant, non-privileged documents from the state agencies is necessary for the Pennsylvania Attorney General to carry out its duties in this Multi-District Litigation. *See id.* Even absent the express statutory right to obtain documents, the mandatory attorney-client relationship is sufficient to establish that the Pennsylvania Attorney General has legal control over the state agencies’ documents here.

Relatedly, the Pennsylvania Attorney General has taken the position that, “should” the Pennsylvania Attorney General be retained by the state agencies with regard to responding to any subpoenas, communications between the Pennsylvania Attorney General and these state agencies would be covered by the attorney-client privilege. [Dkt. 738-9 at 2]. In order to minimize this assertion of privilege, the Pennsylvania Attorney General has attempted to subdivide its own office between the team litigating this case and “different attorneys than those involved in this enforcement action” in order to argue conclusively that the assertion of attorney-client privilege “would not change the possession, custody, or control analysis” without citation to any legal support. *Id.* The Court finds this argument is not supported by citation to law and is contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. This principle, known as the ‘rule of imputed disqualification,’ . . . requires disqualification of all members of a law firm when any one of them practicing alone would be disqualified because of a conflict of interest . . . . The rule of

1 imputed disqualification applies to both private firms and public law firms such as a district  
2 attorney's office or the office of the state public defender."); accord *City of Cnty. of Denver*, 37 P.3d  
3 at 457; see also *Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious  
4 disqualification is the general rule, and that we should presume knowledge is imputed to all  
5 members of a tainted attorney's law firm. However, we conclude that, in proper circumstances, the  
6 presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in  
7 the context of government attorneys, which presumption could be rebutted by proper ethical  
8 screening); cf. also *Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue  
9 “should be screened from any direct or indirect participation in the matter,” vicarious  
10 disqualification of entire office denied); cf. also *Calhoun*, 492 S.W.3d at 137 (individual lawyer  
11 disqualified when joining prosecutors' office but “the entire office in which that attorney works is  
12 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of  
13 the entire prosecuting office is not necessary absent special facts, such as a showing of actual  
14 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public  
15 legal service organizations like private law firms and impute shared confidences among lawyers of  
16 the entire public law entity. Even in jurisdictions which do not automatically impute  
17 disqualification, and shared confidences, to an entire public law office, those courts recognize that  
18 ethical screening or other procedures are required out of recognition that actual (as opposed to  
19 imputed) sharing of confidences may occur and such procedures are required to avoid dissemination  
20 of attorney-client privileged communications within an entire public law organization. This review  
21 of case law demonstrates that no courts support Pennsylvania's argument that different individual  
22 lawyers in the Pennsylvania Attorney General's office have *ex ante* separable, discrete attorney-  
23 client relationships.

24 The Court rejects Pennsylvania's attempt to simultaneously disclaim the existence of an  
25 attorney-client privilege as between the attorneys “involved in this enforcement action” while  
26 apparently attempting to preserve the ability to assert the privilege applies to communications  
27 between other lawyers in the Attorney General's office and these agencies. “[T]o the extent that  
28 [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official

capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. The fact that the Pennsylvania Attorney General is attempting to preserve the ability to assert the attorney-client privilege between the Pennsylvania Attorney General’s office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Indeed, the Pennsylvania Attorney General confirmed that its office could represent all of the Pennsylvania agencies at issue, if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 25]. Accordingly, it appears that under the statutory scheme each agency will be represented by the Pennsylvania Attorney General in this matter for discovery. 71 Pa. Stat. § 732-204. Thus, as a matter of the efficient and rational administration of justice in this case, because the Pennsylvania Attorney General will be involved in representing these state agencies in any event in this case (whether to respond to subpoenas or to respond to party discovery), the Court in its discretion determines that a finding of control is further supported by the simple and pragmatic realities involved in these circumstances.

At oral argument, the Pennsylvania Attorney General (along with other states) raised the same “virtual veto” argument raised by other states. As discussed, this argument is based on an unsupported hypothetical possibility that the state agencies could simply refuse to cooperate with their statutorily-mandated lawyers (the Pennsylvania Attorney General’s office) and refuse to provide documents in response to the document requests. From that, the Pennsylvania Attorney General (consistent with other states) argues that the Attorney General’s office would have no mechanism or recourse if the agencies simply refused, and that this would put the Attorney General’s office in the untenable position of potentially being sanctioned for failure to obtain documents from the state agencies. *Id.* This is a variation on the “virtual veto” argument, discussed above, which the Court finds unpersuasive to rebut the finding of control.

First, the Pennsylvania Attorney General presented no evidence to support this hypothetical risk that the Pennsylvania state agencies would simply refuse to provide documents, and presented

no evidence that these agencies have ever refused to cooperate in discovery in the past. Indeed, this hypothetical refusal by state agencies is a particularly weak argument in light of Pennsylvania’s statutory scheme which gives the Pennsylvania Attorney General the express right to obtain agency documents. Second, this hypothetical raised by the Pennsylvania Attorney General (and other states) is not merely an unfounded “fear”, this argument assumes that the state agencies would act unreasonably in defiance of a discovery Order such as the instant Order. It is not reasonable to base a legal conclusion on an unreasonable, unsupported hypothetical that imagines the worst possible behavior; rather, the law presumes that parties will act reasonably and rationally in response to court Orders. “We think that surely one must assume that litigants will obey court orders. Once we assume otherwise, then our system of jurisprudence is in serious trouble.” *E. I. du Pont de Nemours & Co.*, 442 F. Supp. at 825; *see also Casas*, 2017 WL 1153336, at \*6 (The Court recognized the existence of “the legal presumption that defendants had regularly discharged their duties and complied with the court’s order.”).

Third and perhaps most importantly, if the state agencies simply refused to comply, they would be subject to legal consequences. A Court has the inherent authority to enforce its own Orders in order to control the conduct of the proceedings, protect the “orderly administration of justice,” and to maintain “the authority and dignity of the court.” *Roadway Express, Inc.*, 447 U.S. at 764–67 (citations omitted). Because (as discussed herein) the Court finds that the Pennsylvania Attorney General’s office has legal control of documents from the Pennsylvania state agencies (and thus discovery from the state agencies under Rule 34 is appropriate), then the state agencies would be in direct violation of this very Order if they should hypothetically choose to completely defy this very Order and refuse to provide documents to the Pennsylvania Attorney General. Meta could, in that situation, file a motion to compel and, should the state agencies continue to simply refuse to provide documents, this Court would have the inherent authority to issue sanctions (including monetary sanctions) against the state agencies for any such hypothetical refusal to abide by an Order of this Court. The Pennsylvania Attorney General’s argument that the Court would choose to sanction their office in this situation presumes this Court would act in ignorance of the source of the non-compliance – if, as hypothetically theorized, it were the state agencies who were non-compliant

1 despite the best efforts of the state Attorney General to secure compliance, the Court is perspicacious  
2 enough to understand that the fault would lie with the hypothetical state agency and not the  
3 Pennsylvania Attorney General, and in the event some enforcement mechanism were needed (such  
4 as the hypothetically feared sanctions), the Court would presumably have the wisdom to understand  
5 how and where to focus any such enforcement Order. *Qualcomm*, 2010 WL 1336937, at \*2–5;  
6 *Optronix Techs., Inc.*, 2020 WL 2838806 at \*5–7.

7 Therefore, unlike the factors in *Citric Acid*, the state agencies here would not be in a position  
8 to obstinately refuse to provide documents in response to the document requests without incurring  
9 risk of legal consequences. Unlike in *Citric Acid*, the party here which is alleged to (and found to)  
10 have control (the state Attorney General) does in fact have legal recourse to secure the compliance  
11 of the controlled entities (the state agencies) should they simply refuse to turn over the documents.  
12 This bolsters the Court’s finding that the state Attorney General here does possess the “legal ability”  
13 to obtain the documents from the state agencies, over and in addition to the statutory basis discussed  
14 above. *Cf. Citric Acid*, 191 F.3d at 1107 (lack of “legal ability” to obtain documents is a factor in  
15 finding no “legal control”). The fact that legal recourse is available in this event is therefore a factor  
16 which, according to *Citric Acid*, demonstrates that legal control exists in the factual circumstances  
17 here.

18 As discussed above, the Court is not persuaded by the argument that the Pennsylvania  
19 Attorney General lacks control over state agency documents, because an attorney in a court  
20 proceeding can simply do nothing when faced with a client who (hypothetically here) refuses to  
21 collect or provide documents for production in discovery. As counsel for a party subject to  
22 discovery, the Pennsylvania Attorney General has the legal authority and duty to take action to make  
23 inquiry and collect the documents from the uncooperative state agencies directly, and cannot simply  
24 sit on their hands in the face of an uncooperative client – this is would not be the first time an  
25 attorney was faced with a client who was difficult to deal with in collecting documents for discovery.  
26 *See, e.g., Qualcomm*, 2010 WL 1336937, at \*2–5. Counsel in a litigation has legal duties to take  
27 pro-active steps in supervising and searching for documents in discovery that go far beyond simply  
28 acceding to a client who fails to (or worse, refuses to) produce or provide documents. *Id.* (detailing



“Discovery Errors” by counsel); *Rodman*, 2016 WL 5791210, at \*3–4. Counsel cannot simply advise clients about document requests and leave it up to the client to decide whether or not to risk sanctions for failure to produce – in appropriate circumstances, counsel may need to personally conduct or directly supervise a client’s collection, review, and production of responsive documents. *Optronic Techs., Inc.*, 2020 WL 2838806 at \*5–7 (“The Court does not conclude that counsel must always personally conduct or directly supervise a client’s collection, review, and production of responsive documents. However, in the circumstances presented here, the Court finds that [counsel] Sheppard Mullin did not make a reasonable effort . . . . [T]he Court orders Ningbo Sunny’s new counsel of record to undertake an independent effort to ensure that Ningbo Sunny fully complies with Orion’s post-judgment document requests.”). The Court rejects as legally erroneous the Pennsylvania Attorney General’s arguments, because they are based on a misunderstanding of counsel’s role (and duties) in discovery and the available procedures under the Federal Rules for the proper conduct of discovery and the rational administration of justice. *See King*, Case No. 20-cv-04322-LGS-OTW, Dkt. 272, slip op. at 2 (“embroil[ing the judge] in day-to-day supervision of discovery [is] a result directly contrary to the overall scheme of the federal discovery rules.”).

In addition to their duties to supervise the collection of documents and make inquiry of clients to ensure proper collection of documents is undertaken, attorneys representing clients in court proceedings have legal duties under the Federal Rules of Civil Procedure to work cooperatively to improve the administration of civil justice, both as officers of the Court and under their ethical obligations as members of the bar of this Court. *See* Fed. R. Civ. P. 1 advisory committee’s note to 2015 amendment. “Rule 26(g) imposes ***an affirmative duty to engage in pretrial discovery in a responsible manner*** that is consistent with the spirit and purposes of Rules 26 through 37 . . . . The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that ***obliges each attorney*** to stop and think about the legitimacy of a discovery request, ***a response thereto, or an objection*** . . . . If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.” *See* Fed. R. Civ. P. 26 advisory committee’s note to 1983 amendment.

As the Ninth Circuit has recognized, “legal duties” are jural correlatives and logically

1 antecedent to “legal rights” – and thus the Pennsylvania Attorney General’s legal duties to undertake  
2 proactive efforts to collect documents from clients in discovery are the flip side to the legal right to  
3 access those documents. *Newman*, 287 F.3d at 790 n.5 (“The logical relationship between rights  
4 and duties has been the subject of considerable academic examination. Wesley Hohfeld famously  
5 described rights and duties as ‘jural correlatives’—different aspects of the same legal relation.  
6 Oliver Wendell Holmes described rights as ‘intellectual constructs used to describe the  
7 consequences of legal obligations. [sic] As he puts it [in *The Common Law* (1881)], ‘legal duties  
8 are logically antecedent to legal rights.’”) (internal citations omitted). Here, the recognition that a  
9 state Attorney General, acting as counsel for the state agencies here, has legal duties to supervise  
10 the collection of (and possibly directly obtain) documents from those agencies for discovery lends  
11 further support to the conclusion that the state Attorney General has the legal right to access those  
12 documents. That is, counsel’s legal duty to ensure collection of documents from a client is a  
13 different aspect of (and correlates juridically to) a legal right to access those documents, and thus  
14 supports the conclusion of control for purposes of discovery.

15 The Pennsylvania Attorney General’s role as counsel for the agencies at issue inherently  
16 involves obtaining necessary documents for effective representation in litigation. In acting as  
17 counsel, the Pennsylvania Attorney General would necessarily have access to and thus control over  
18 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,  
19 at \*5–6 (finding state Attorney General has control over agency documents “based on his broad  
20 statutory and common law powers to control and manage legal affairs on behalf of state agencies,  
21 has a legal right to obtain responsive documents from the state agencies referenced in the  
22 Complaint”). To the extent the Pennsylvania Attorney General argues that these agencies are  
23 “separate entities under law” from the state Attorney General and are not supervised by the state  
24 Attorney General, *see* Dkt. 738-29 at 2, that argument misapprehends the “legal control” test for  
25 documents – the issue is not simply whether one entity is under the day-to-day operational control  
26 of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the  
27 two entities are legally separate (such as two different and separately incorporated entities), but  
28 rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The

control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the Pennsylvania Attorney General “neither governs nor is governed by another Commonwealth agency” is simply re-stating the issue, *id.* (citation omitted), and not determinative of the issue. Arguing that the Pennsylvania Attorney General is “an independent agency”, *id.*, confuses and conflates the “legal control” issue for discovery with “operational control” or “functional independence” and thus constitutes a legally erroneous argument.

Meta has argued that state agencies are part of the government of the Commonwealth of Pennsylvania (the Plaintiff) and thus should be treated as parties for purposes of discovery based on that status. [Dkt. 685 at 6 n.4]. Semantically this position may have some facial appeal at a broad level. *See In re Redf Mktg., LLC*, No. 12-32462, 2015 WL 1137661, at \*3 (Bankr. W.D.N.C. Mar. 10, 2015) (“state agencies are, as the term suggests, agents of the state.”). If the Pennsylvania state agencies are agents of the state, then under *Hitachi*, that factor would militate in favor of finding “legal control.” *Hitachi*, 2006 WL 2038248, at \*1. However, determining whether a particular state agency is an agent of its sovereign state appears to involve a multi-factor analysis. *See Savage v. Glendale Union High School Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1040–41 (9th Cir. 2003) (“To determine whether a governmental entity is an arm of the state for Eleventh Amendment

purposes, we examine the following factors: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity.”). Here, Meta has not cited law to establish whether “agency” for purposes of discovery is evaluated under the same legal standard as “agency” for purposes of sovereign immunity, and further Meta has provided only cursory argument to support a finding that each of the six Pennsylvania state agencies should be held to be agents of the Commonwealth of Pennsylvania for purposes of discovery under applicable legal standards. Accordingly, while the Court notes this factor, it is non-dispositive on the record presented to the Court.

The Pennsylvania Attorney General has cited no statutory, legal, or administrative rule cited which prohibits the Pennsylvania Attorney General from accessing the documents of the state agencies at issue, and as discussed above, there is an express statute granting that access. Nor is there citation to any statutory or legal prohibition on the Pennsylvania Attorney General’s representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization (the Attorney General) is both counsel to a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party or counsel to a party; rather under the particular facts here and under the totality of circumstances viewed in light of

applicable legal standards, the Court finds that control exists here.

Indeed, at least one other federal court has previously found that the Pennsylvania Attorney General has legal control over Pennsylvania state agency materials. *Generic Pharmaceuticals (I)*, 571 F. Supp. 3d at 408; *see also* 2023 WL 6985587, at \*3 (E.D. Pa. Oct. 20, 2023). While this Court reaches its own independent conclusions consistent with the applicable legal standards discussed herein in light of the facts and circumstances presented here, the analysis in both opinions from the Pennsylvania federal district court in the *Generic Pharmaceuticals (I)* and *Generic Pharmaceuticals (II)* Multi-District Litigations are certainly consistent with (and to that extent further persuasively supports) the conclusion here with regard to the Pennsylvania Attorney General’s having control with regard to documents of the state agencies at issue. Given that the *Generic Pharmaceuticals (I)* Court resolved the control issue against all the objecting states including Pennsylvania, this Court is disappointed that the Pennsylvania Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where (as here) there is guidance in precedent on the discovery issue at hand.

## XXIX. RHODE ISLAND

In opposition to the control issue, the Rhode Island Attorney General argues primarily the following factors: (1) the Rhode Island Attorney General is a separate entity and independent from the Rhode Island agencies; and (2) the Rhode Island Attorney General only represents Rhode Island agencies if requested by said agency and if the Rhode Island Attorney General consents to act as legal counsel. [Dkt. 738-30 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) that the Rhode Island Attorney General is the legal representative of all state agencies, and (2) that no statute deprives the Rhode Island Attorney General from accessing Rhode Island agency documents. *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Board of Governors for Higher Education; Department of Administration; Department of Behavioral Healthcare, Developmental Disabilities and Hospitals;

Department of Children, Youth, and Families; Department of Education; Department of Health; Department of Human Services; Executive Office of Health and Human Services; Office of the Governor; and Office of the Child Advocate. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Rhode Island Attorney General does have legal control, for purposes of discovery, over the listed Rhode Island agencies.

The statutory scheme in Rhode Island requires that “the attorney general, whenever requested, ***shall act*** as the legal adviser of . . . all state boards, divisions, departments, and commissions . . . and shall institute and prosecute, whenever necessary, all suits and proceedings which they may be authorized to commence, and ***shall appear for*** and defend the . . . boards, divisions, departments, commissions, commissioners, and officers, ***in all suits*** and proceedings which may be brought against them in their official capacity.” 42 R.I. Gen. Laws § 42-9-6 (emphasis added).

Indeed, the Rhode Island Attorney General confirmed that its office could represent all the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 25–26]. As discussed above, no separate counsel has entered appearance on behalf of the Rhode Island state agencies. Accordingly, it appears that under the statutory scheme each agency will be represented by the Rhode Island Attorney General in this matter for discovery. *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 17 (1st Cir. 2020) (the Rhode Island “attorney general . . . by law is obligated to act as legal advisor ***for all state agencies*** and officers acting in their official capacity and to defend them against suit, R.I. Gen. Laws § 42-9-6[.]”) (emphasis added). Certainly, in the face of this statutory scheme, it is not surprising that the Rhode Island Attorney General cites no law which prohibits that office from representing the state agencies in this matter.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Rhode Island Attorney General from accessing the documents of the state agencies at issue. The Rhode Island Attorney General argues that the “Rhode Island laws that permit or require sharing of information do so in the context of affirmative investigations, actions, or projects.” Dkt. 738-30 at 2 (citations omitted). However, several of these statutes relate to sharing information with agencies



or commissions other than the Attorney General and are thus irrelevant to the control issue here. *See, e.g.*, Dkt. 738-30 at 2 (citing R.I. Gen. Laws § 42-119-8 (disclosure to the R.I. Commission on Women and Girls; § 42-26-11 (disclosure to “commission of the Public Safety Grant Administration Office”)). Other cited statutes relate to disclosures from agencies not involved in this action or for statutory purposes unrelated to this Multi-District Litigation, and thus are not instructive on the control issue here. *See, e.g.*, Dkt. 738-30 at 2 (citing R.I. Gen. Laws § 42-45.1-12 (relating to Antiquities Act of R.I.); § 42-66-10 (relating to Office of Healthy Aging, not at issue in this Multi-District Litigation); § 42-66.7-9(b) (relating to long term care ombudsman, not at issue in this Multi-District Litigation)). Further, while these statutes provide for disclosure of information in the context of certain investigations or for identified purposes, none of these statutes state that they are the **only** method by which the Rhode Island Attorney General may obtain documents from state agencies. Indeed, the only cited statute which relates to an agency at issue in this case, *see* dkt. 738-30 at 2 (citing R.I. Gen. Laws § 42-72-8(b)), grants the Rhode Island Attorney General the unrestricted legal rights to access documents and information from the Rhode Island Department of Children, Youth, and Families, in circumstances involving either an investigation of (or prosecution of) criminal conduct by another person relating to a child or other children within the same family unit, or an investigation of (or prosecution of) false reporting of child abuse or neglect. *See* R.I. Gen. Laws §§ 42-72-8(b)(7), -8(b)(9). If the Rhode Island Attorney General were currently investigating any potential criminal charges against Meta relating to children (which is known only to the Rhode Island Attorney General at this time), then the Rhode Island Attorney General would have a legal right to access (and thus control) over the documents of the Rhode Island Department of Children, Youth, and Families. In any event, close reading of these statutes, ultimately, demonstrates that none of them explicitly or implicitly forbid the Rhode Island Attorney General from accessing documents for the purposes of discovery during its scope of legal representation of the state agencies.

The Rhode Island Attorney General argues that agencies “routinely require the [Rhode Island Attorney General’s] Office to issue subpoenas in enforcement cases before producing documents to the Office.” [Dkt. 738-30 at 2]. From this, the Rhode Island Attorney General appears

to be arguing that the only way to obtain documents from state agencies would be by subpoena here, even if the Rhode Island Attorney General were representing those very same state agencies as clients (and not as the subjects of investigations). An argument that a lawyer representing a Rhode Island state agency (whether the state Attorney General or private counsel) would be forced to issue a subpoena to obtain documents from their own client is nonsensical and impractical, as well as contrary to the principles of effective legal representation. As counsel for a state agency, the Rhode Island Attorney General will have the normal type of direct access to the necessary documents from its own clients, ensuring efficient and comprehensive legal support for the agencies involved. Under the statutory scheme, the Rhode Island Attorney General is regularly called upon to represent the interests of state agencies, which inherently requires a level of access to agency documents necessary to render legal representation effectively. The Rhode Island Attorney General cites no precedent requiring any attorneys representing a Rhode Island state agency to use a subpoena to obtain documents from their own clients. The Rhode Island Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the Rhode Island Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”).

Relatedly, the Rhode Island Attorney General has stated that the attorney client privileged is not asserted for communications between the Rhode Island Attorney General and these state agencies “unless the Office has explicitly agreed to represent a state agency.” [Dkt. 738-30 at 2]. The fact that the agencies had not formally retained the Attorney General as of the date of the submission of their brief does not alter the reality that, under the statutory scheme, they will be retained by the Attorney General once discovery formally is initiated against them by Meta (whether by Rule 45 subpoena or by party discovery pursuant to this Order). The fact that the Rhode Island Attorney General implicitly acknowledges that it could be retained by these agencies (and thus the

attorney-client privilege would apply to communications with the agencies) further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further the Rhode Island Attorney General explicitly argues that communications between the state agencies and the Attorney General may be protected by the work product doctrine. [Dkt/ 738-30 at 2]. The fact that the Rhode Island Attorney General asserts that pre-suit communications with the state agencies may be protected by the work product doctrine is an implicit admission that these agencies may have been involved in pre-suit investigations, may have interests in the outcome of this case, and (at a minimum) worked with the Attorney General on this case in a pre-suit attorney-client relationship. As discussed above, case law recognizes that factors that support a finding of control include situations where the third party has an interest in the outcome of the matter and where the third party participated in the preparation of or prosecution of the matter behind the scenes as an unnamed party. *See, e.g., Hitachi*, 2006 WL 1038248, at \*1. Asserting the work product doctrine over communications with state agencies thus further supports a finding of control here.

The Court rejects the Rhode Island Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege over communications with the agencies at issue, while apparently attempting to preserve the ability to assert work product protection applies to communications between the Rhode Island Attorney General’s Office and these agencies. “[I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2.

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization (the Attorney General) is both counsel to a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit

required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

Further, the Rhode Island Attorney General argues that the Rhode Island Attorney General is a separate and distinct elected entity with separate duties and responsibilities. Dkt. 738-30 at 2 (“Rhode Island state agencies are represented by separate and distinct legal counsel, and Rhode Island laws only delegate such a right or duty in limited circumstances.”). However, this argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. The Rhode Island Attorney General’s

arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Therefore, the Court concludes that the Rhode Island Attorney General has legal control, for the purposes of discovery, over the documents held by the Rhode Island agencies listed by Meta.

### XXX. SOUTH CAROLINA

In opposition to the control issue, the South Carolina Attorney General argues primarily the following factors: (1) the South Carolina Attorney General is a separate entity and independent from the South Carolina agencies; and (2) the South Carolina Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-31 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) that South Carolina agencies are proscriptively barred from obtaining counsel other than the South Carolina Attorney General, without consent from the South Carolina Attorney General, and (2) that the South Carolina Constitution and local law provides the South Carolina Attorney General the ability to require all state agencies to provide information in writing upon any subject. *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Commission on Higher Education, Department of Administration Executive Budget Office, Department of Children’s Advocacy, Department of Commerce, Department of Consumer Affairs, Department of Education, Department of Health and Human Services, Department of Mental Health, Department of Social Services, Education Oversight Committee, and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the South Carolina Attorney General does have legal control, for purposes of discovery, over the listed South Carolina agencies. While the South Carolina Attorney General is a separate entity and while the South Carolina Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the South Carolina Attorney General will act as the agencies’ counsel.

The statutory scheme in South Carolina requires that “the Attorney General *shall* conduct

all litigation which may be necessary for *any department of the state government* or any of the boards connected therewith, and all these boards or departments are *forbidden to employ any counsel* for any purpose except through the Attorney General and upon his advice[.]” S.C. Code § 1-7-80 (emphasis added).

Indeed, the South Carolina Attorney General confirmed that its office could represent the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 27–28]. Accordingly, under the statutory scheme each agency will be represented by the South Carolina Attorney General in this matter for discovery.

Importantly, the South Carolina Attorney General’s arguments do not negate the fact that all of the South Carolina agencies at issue here are barred by South Carolina law from obtaining counsel other than the South Carolina Attorney General. S.C. Code § 1-7-80; *see also* S.C. Code § 1-7-160 (“[a] department or agency of state government may not hire a classified or temporary attorney as an employee except upon the written approval of the Attorney General and at compensation approved by him.”). This arrangement indicates strongly that the South Carolina Attorney General, in fulfilling its statutory role for the state agencies, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies.

Further, there is no statutory, legal, or administrative rule cited which prohibits the South Carolina Attorney General from accessing the documents of the state agencies at issue. Indeed, the contrary is true. South Carolina law permits the South Carolina Attorney General to access agencies’ documents at the direction of the Governor. *See The State of South Carolina v. Purdue Pharma L.P.*, No. 2017CP4004872, 2019 WL 3753945 (S.C.Com.Pl. July 05, 2019). In *Purdue Pharma*, the South Carolina court found “unconvincing” the State of South Carolina’s refusal to produce documents from certain agencies “on the ground that information in the possession, custody, or control of executive agencies other than the Attorney General, as well as the Public Employee Benefit Authority and Department of Health and Human Services (both of whom were expressly named in the Amended Complaint), is outside of the State’s possession, custody, or control.” *Id.* at \*1. Based on the South Carolina Constitution, the *Purdue Pharma* court held that “[a]s the legal representative of the executive branch, the Attorney General, at the direction of the



Governor, has the ability to require ‘[a]ll State officers, agencies, and institutions within the Executive Branch’ to ‘give him information in writing upon any subject relating to the duties and functions of their respective offices, agencies, and institutions.’” *Id.* (quoting S.C. Const. Art. IV, § 17). Citing South Carolina Rule of Civil Procedure 34 (which is analogous to Fed. R. Civ. P. 34, and includes the same “possession, custody, or control” language), the *Purdue Pharma* court held that “the contested information nonetheless appears to be within the possession, custody or control of the Attorney General.” *Id.*

Under *Citric Acid*, if there were a “legal mechanism” to obtain the documents (such as filing a breach of contract action, which by definition would require seeking assistance in enforcement from a judicial officer in a legal action), then there would have been a finding of “control” for purposes of discovery. 191 F.3d at 1107-08. Here, under the South Carolina Constitution and *Purdue Pharma*, there is a legal mechanism for the South Carolina Attorney General to obtain the agencies’ documents. Under *Citric Acid*, the fact that enforcement was contingent on a court or judicial officer exercising authority to grant relief in a breach of contract case did not detract from the legal right to access; here analogously, the fact that direction from the Governor under the Constitution did not (in *Purdue Pharma*) detract from the Attorney General’s legal right to access the agencies’ documents. Based on the South Carolina Constitution and *Purdue Pharma*, the Court finds that there is a legal right for the South Carolina Attorney General to access the state agencies’ documents upon demand, and thus “control” exists under Rule 34 for at least these reasons.

There is no citation to any statutory or legal prohibition on the South Carolina Attorney General’s representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is a party to the case while also acting as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive

1 materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court  
2 has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s  
3 possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be  
4 a finding of a legal right of access to and thus control over third party client documents in every  
5 case involving a legal services provider as a party; rather, under the particular facts here, and under  
6 the totality of circumstances viewed in light of applicable legal standards, the Court finds that  
7 control exists here.

8 The South Carolina Attorney General’s role as counsel for the agencies at issue inherently  
9 involves obtaining necessary documents for effective representation in litigation. In acting as  
10 counsel, the South Carolina Attorney General would necessarily have access to and thus control  
11 over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL  
12 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his  
13 broad statutory and common law powers to control and manage legal affairs on behalf of state  
14 agencies, has a legal right to obtain responsive documents from the state agencies referenced in the  
15 Complaint”).

16 Relatedly, the South Carolina Attorney General has taken the position that communications  
17 between the South Carolina Attorney General and these state agencies “would be protected under  
18 the attorney-client privilege” if that office were retained by such agencies. [Dkt. 738-31 at 2]. The  
19 fact that the agencies had not formally retained the Attorney General as of the date of the submission  
20 of their brief does not alter the reality that, under the statutory scheme, they will be retained by the  
21 Attorney General once discovery formally is initiated against them by Meta (whether by Rule 45  
22 subpoena or by party discovery pursuant to this Order). The fact that the South Carolina Attorney  
23 General admits could be retained by these agencies and thus the attorney-client privilege would  
24 apply to communications with the agencies further supports the conclusion of control here.  
25 Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-  
26 client relationship. *See Graf*, 610 F.3d at 1156.

27 Further the South Carolina Attorney General, like other states, argues that responding to a  
28 subpoena “would be handled by different attorneys than those involved in this enforcement action”

1 and that therefore this “would not change the possession, custody, or control analysis.” *Id.* This  
2 argument is not supported by citation to any law. The scope of attorney-client relationship (and the  
3 duties flowing therefrom, including the scope of the attendant attorney-client privilege)  
4 encompasses the entirety of a legal services organization due to well-known rules of imputation of  
5 confidences to a legal services organization, including a public law office. *See, e.g., People ex rel.*  
6 *Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies to both private firms and  
7 public law firms such as a district attorney’s office or the office of the state public defender.”);  
8 *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We  
9 do not doubt that vicarious disqualification is the general rule, and that we should presume  
10 knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that,  
11 in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption  
12 of imputed knowledge in the context of government attorneys, which presumption could be rebutted  
13 by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government  
14 lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious  
15 disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer  
16 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is  
17 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of  
18 the entire prosecuting office is not necessary absent special facts, such as a showing of actual  
19 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public  
20 legal service organizations like private law firms and impute shared confidences among lawyers of  
21 the entire public law entity. Even in jurisdictions which do not automatically impute  
22 disqualification, and shared confidences, to an entire public law office, those courts recognize that  
23 ethical screening or other procedures are required out of recognition that actual (as opposed to  
24 imputed) sharing of confidences may occur and such procedures are required to avoid dissemination  
25 of attorney-client privileged communications within an entire public law organization. This review  
26 of case law demonstrates that there is insufficient legal support for South Carolina’s argument that  
27 having different individual lawyers in the South Carolina Attorney General’s office represent the  
28 agencies for discovery somehow inexplicably “would not change” the “control” analysis. [Dkt.

738-31 at 2].

The Court rejects the South Carolina Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the attorneys currently “involved in this enforcement action,” while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the South Carolina Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2.

To the extent the South Carolina Attorney General argues that the South Carolina Attorney General is a separate and distinct elected entity with separate duties and responsibilities from the state agencies, that argument is not persuasive. Dkt. 738-31 at 2 (“The [South Carolina Attorney General] does not share a common executive with any of these agencies, which stand independently from the Attorney General’s Office.”). This argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “‘The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.’” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed

above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the South Carolina Attorney General “brings an action on behalf of the State of South Carolina . . . and not as the legal representative or attorney of any department or agency of state government,” dkt. 738-31 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The South Carolina Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, South Carolina is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that South Carolina was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the South Carolina Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

Therefore, the Court concludes that the South Carolina Attorney General has legal control, for the purposes of discovery, over the documents held by the South Carolina agencies listed by

Meta.

### XXXI. SOUTH DAKOTA

In opposition to the control issue, the South Dakota Attorney General argues primarily the following factors: (1) the South Dakota Attorney General is a separate entity and independent from the South Dakota agencies; (2) the South Dakota Attorney General is not automatically required to represent South Dakota agencies, and once such representation occurs, South Dakota law grants the South Dakota Attorney General access to the South Dakota agencies’ documents. [Dkt. 738-32 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) the South Dakota Attorney General is South Dakota’s “representative in judicial proceedings;” and (2) no statute deprives the South Dakota Attorney General from access to South Dakota agency documents. *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Board of Regents, Bureau of Finance and Management, Department of Education, Department of Health, Department of Social Services, Governor’s Office, and Governor’s Office of Economic Development. *Id.*

The statutory scheme in South Dakota requires that “[i]t is the duty of the attorney general: (1) To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested as a party; [and] (2) When requested by the Governor or either branch of the Legislature, or whenever, in the judgment of the attorney general, the welfare of the state demands, to appear for the state and prosecute or defend, in any court or before any officer, **any cause or matter, civil** or criminal, in which the state may be a party or interested[.]” S.D. Codified Laws § 1-11-1 (emphasis added).

Indeed, the South Dakota Attorney General confirmed that its office could represent the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 28–29]. As discussed above, no separate counsel has appeared for any of the state agencies at issue. Accordingly, it appears that under the statutory scheme each agency will be represented by the South Dakota Attorney General in this matter for discovery.

Further, there is no statutory, legal, or administrative rule cited which prohibits the South



Dakota Attorney General from accessing the documents of the state agencies at issue. Indeed, the contrary is true. South Dakota law permits the South Dakota Attorney General to access agencies’ documents with consent of the Governor. S.D. Codified Laws § 1-11-10 (“Under such resolution or order of the Governor, or the attorney general’s own relation with consent of the Governor, the attorney general . . . shall have access to any and all books, blanks, . . . and materials and equipment of the office, department, bureau, board, commission, or any other component part of the state government or any branch, arm, or agency of the government[.]”). The South Dakota Attorney General admits that there are other specific statutes giving the Attorney General the right to access certain agencies’ documents under certain conditions. [Dkt. 738-32 at 2]. In *Citric Acid*, the lack of control was based on a lack of “legal mechanism” to obtain the documents (such as filing a breach of contract action, which by definition would require seeking assistance in enforcement from a judicial officer in a legal action). 191 F.3d at 1107-08. Here, under these statutes, there appear to be legal mechanisms for the South Dakota Attorney General to obtain the documents – for example, under Section 1-11-10, the Attorney General has the legal authority under its “own relation” to have access to the records of any agency, with the assistance and consent of the Governor. Under *Citric Acid*, the fact that enforcement was contingent on a court or judicial officer exercising authority to grant relief in a breach of contract case did not detract from the legal right to access; here analogously, the fact that consent is required from the Governor under the statute should not detract from the Attorney General’s legal right to access the agencies’ documents.

The South Dakota Attorney General does not provide any citation to any statutory or legal prohibition on the South Dakota Attorney General’s representing the state agencies in this matter for purposes of discovery. See Dkt. 738-32 at 2. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization (the attorney general) is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. See, e.g., *Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production

1 to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas  
2 and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general,  
3 an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL  
4 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of  
5 access to and thus control over third party client documents in every case involving a legal services  
6 provider as a party; rather, under the particular facts here, and under the totality of circumstances  
7 viewed in light of applicable legal standards, the Court finds that control exists here.

8 Relatedly, the South Dakota Attorney General has taken the position that communications  
9 between the South Dakota Attorney General and these state agencies would be covered by the  
10 attorney-client privilege. [Dkt. 738-32 at 2]. The fact that the South Dakota Attorney General  
11 admits it “may appear on behalf of the state agencies” and thus “would assert” that communications  
12 with the agencies are privileged further supports the conclusion of control here. Assertion of the  
13 attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship.  
14 *See Graf*, 610 F.3d at 1156.

15 Finally, the Court has recognized that the issue of control of state agency documents, when  
16 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-  
17 District Litigation involving most of the same States and State Attorneys General as are involved in  
18 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*  
19 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States  
20 which withdrew their objections to party discovery and negotiated a resolution of this issue with the  
21 opposing party there. *Id.* at 356 n.5. In that case, South Dakota is identified as one of the States  
22 which reached agreement on the state agency control issue without requiring that court to expend  
23 resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion  
24 resolved the control issue against all the remaining objecting states and given that South Dakota was  
25 able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is  
26 disappointed that the South Dakota Attorney General and Meta were unable to reach a negotiated  
27 resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery  
28 Management Conferences, they should make every effort to work out discovery disputes through

reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

Therefore, the Court concludes that the South Dakota Attorney General has legal control, for the purposes of discovery, over the documents held by the South Dakota agencies listed by Meta.

## XXXII. VIRGINIA

In opposition to the control issue, the Virginia Attorney General argues primarily the following factors: (1) the Virginia Attorney General is a separate entity and independent from the Virginia agencies; and (2) the Virginia Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-33 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues based primarily on the following factors: (1) the Virginia Attorney General is required to conduct all legal services for Virginia agencies, and (2) Virginia law prohibits the Governor and agencies from employing regular counsel. *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Department of Behavioral Health and Developmental Services, Department of Education, Department of Health, Department of Planning and Budget, Department of Social Services, Economic Development Partnership, Foundation for Healthy Youth, Office of Children's Services, and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Virginia Attorney General does have legal control, for purposes of discovery, over the listed Virginia agencies. While the Virginia Attorney General is a separate entity and while the Virginia Attorney General brought the instant action pursuant to its own authority, this does not outweigh the requirement that the Virginia Attorney General will act as the agencies' counsel.

The statutory scheme in Virginia requires that "[a]ll legal service in civil matters for the Commonwealth, the **Governor, and every** state department, institution, division, commission, board, bureau, **agency**, entity, official, court, or judge, including the conduct of **all civil litigation** in which any of them are interested, **shall** be rendered and performed by the Attorney General." Va.

Code § 2.2-507 (emphasis added). Additionally, Virginia law requires that “[n]o regular counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, or official.” *Id.*

Indeed, the Virginia Attorney General confirmed that its office will definitely represent all the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 29–30]. Accordingly, under the statutory scheme each agency will be represented by the Virginia Attorney General in this matter for discovery (whether for party discovery under Rule 34 or for subpoenas under Rule 45).

Importantly, the Virginia Attorney General’s arguments do not negate the fact that all of the Virginia agencies at issue here are barred by Virginia law from obtaining counsel other than the Virginia Attorney General, absent certain special conditions not present here. Va. Code § 2.2-510 (requiring Governor approval, where it is impracticable or uneconomical for the Virginia Attorney General to render such services, or where the Virginia Attorney General must certify to the Governor that it is unable to render certain legal services). Here, no separate counsel has entered appearance for any of the state agencies, and indeed based on the Virginia Attorney General’s confirmation of representation, none is expected to. This arrangement indicates strongly that the Virginia Attorney General, in fulfilling its statutory role for the state agencies, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies.

Relatedly, the Virginia Attorney General has taken the position that communications between the Virginia Attorney General and these state agencies “could” be covered by the attorney-client privilege. [Dkt. 738-33 at 2]. To the extent the Virginia Attorney General has attempted to subdivide its own office between the Attorney General’s Consumer Protection Section litigating this case as opposed to “attorneys in other sections of the Department of Law” in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts of the state Virginia Attorney General’s office but not other “sections,” that argument is not supported by citation to law and is contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety

of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that there is insufficient legal support for Virginia’s argument that different individual lawyers in the Virginia Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Virginia Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the “section” of attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to

communications between other lawyers in the Virginia Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. The fact that the Virginia Attorney General is attempting to preserve the ability to assert the attorney-client privilege between the Virginia Attorney General’s office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

The Virginia Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the Virginia Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”).

Further, the Virginia Attorney General argues that the Virginia Attorney General and the Virginia Governor are “separately elected constitutional officers with distinct duties and independent authority.” Dkt. 738-33 at 2 (citations omitted). However, this argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship



mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the Virginia Attorney General brought this action “pursuant to the Attorney General’s own authority to enforce the Virginia Consumer Protection Act[.]” dkt 738-33 (citing Va. Code § 59.1-203), is simply re-stating the issue to be decided, and not determinative of the issue. The Virginia Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Therefore, the Court concludes that the Virginia Attorney General has legal control, for the purposes of discovery, over the documents held by the Virginia agencies listed by Meta.

### **XXXIII. WASHINGTON**

In opposition to the control issue, the Washington Attorney General argues primarily the following factors: (1) the Washington Attorney General is a separate entity and independent from the Washington agencies; and (2) the Washington Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-34 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) the Washington Attorney General must act as counsel for the Washington agencies; and (2) the Washington Attorney General has already confirmed that it would represent the identified agencies in responding to a Meta subpoena. *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Department of Children, Youth, and Families; Department of Health; Health Care Authority; Office of Financial Management Washington Office

of the Governor; Board of Education; Board of Health; Department of Commerce; Department of Health; and Department of Social and Health Services. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Washington Attorney General does have legal control, for purposes of discovery, over the listed Washington agencies. While the Washington Attorney General is a separate entity and while the Washington Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the Washington Attorney General will act as the agencies’ counsel.

The statutory scheme in Washington requires that “[t]he attorney general ***shall*** also represent the state and all officials, departments, boards, commissions and ***agencies*** of the state in the courts, and before all administrative tribunals or bodies of any nature, ***in all legal or quasi legal matters***, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.” Wash. Rev. Code § 43.10.040 (emphasis added).

Indeed, the Washington Attorney General confirmed that its office would definitely represent all the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 30]. Accordingly, under the statutory scheme each agency will be represented by the Washington Attorney General in this matter for discovery (whether or not sought under Rule 34 or under Rule 45).

Relatedly, the Washington Attorney General has taken the position that communications between the Washington Attorney General and these state agencies would be covered by the attorney-client privilege. [Dkt. 738-34 at 2]. To the extent the Washington Attorney General has attempted to subdivide its own office between the “CP Division” litigating this case and other “AGO attorneys” in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts of the state Washington General’s office but not other sub-teams, that argument is not supported by citation to law and is contrary to the weight of law. The scope of an attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client

1 privilege) encompasses the entirety of a legal services organization due to well-known rules of  
2 imputation of confidences to a legal services organization, including a public law office. *See, e.g.,*  
3 *People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a law firm, the principle  
4 of loyalty to the client extends beyond the individual attorney and applies with equal force to the  
5 other attorneys practicing in the firm. This principle, known as the ‘rule of imputed disqualification,’  
6 . . . requires disqualification of all members of a law firm when any one of them practicing alone  
7 would be disqualified because of a conflict of interest . . . . The rule of imputed disqualification  
8 applies to both private firms and public law firms such as a district attorney’s office or the office of  
9 the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal.  
10 Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and  
11 that we should presume knowledge is imputed to all members of a tainted attorney’s law firm.  
12 However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The  
13 court recognizing presumption of imputed knowledge in the context of government attorneys, which  
14 presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266  
15 (because individual government lawyer at issue “should be screened from any direct or indirect  
16 participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492  
17 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office  
18 in which that attorney works is not disqualified as long as the disqualified attorney is appropriately  
19 screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such  
20 as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some  
21 jurisdictions treat public legal service organizations like private law firms and impute shared  
22 confidences among lawyers of the entire public law entity. Even in jurisdictions which do not  
23 automatically impute disqualification, and shared confidences, to an entire public law office, those  
24 courts recognize that ethical screening or other procedures are required out of recognition that actual  
25 (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid  
26 dissemination of attorney-client privileged communications within an entire public law  
27 organization. This review of case law demonstrates that no courts support Washington’s argument  
28 that different individual lawyers in the Washington Attorney General’s office have *ex ante*

separable, discrete attorney-client relationships.

The Court rejects the Washington Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the “CP Division” of attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the Washington Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. The fact that the Washington Attorney General is attempting to preserve the ability to assert the attorney-client privilege between the Washington Attorney General’s office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

The Washington Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In *Rhea*, the Washington Attorney General was representing a state agency and was sanctioned by the Washington District Court for failure to properly search for sources of information to provide documents in discovery. *Rhea*, 2010 WL 5395009 at \*6-7 (counsel ‘has an obligation to not just request documents of his client, but to search for sources of information.’”). In acting as counsel, the Washington Attorney General has both discovery duties under the Federal Rules but also ethical and professional duties which would necessarily provide access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”).

Further, the Washington Attorney General argues that the Washington Attorney General is a separate and distinct elected entity with separate duties and responsibilities. Dkt. 738-34 at 2

(citations omitted). However, this argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the Washington Attorney General is not suing on behalf of or representing any state agency in this litigation and arguing that this action is brought under independent statutory authority, *dkt. 738-34 at 2*, is simply re-stating the issue to be decided, and not determinative of the issue. The Washington Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Furthermore, the Western District of Washington’s *Wilson v. Washington*, No. C16-5366 BHS, 2017 WL 518615 (W.D. Wash. Feb. 8, 2017), opinion on “control” involving Washington State agencies is instructive. In *Wilson*, the plaintiffs sued the State of Washington, one specific agency, and an individual official of the state. The defendants, represented by the Washington Attorney General, objected to document requests on that grounds “that they lack control or custody

1 of information sought by Plaintiff. Specifically, they argue that the requested information is held  
2 by state agencies ***not listed as defendants.***” *Id.* at \*3. The Washington district judge ruled that  
3 “[t]his argument is unavailing.” *Id.* (citing *Soto*, 162 F.R.D. at 619). Here, as in *Wilson*, the State  
4 of Washington is a named plaintiff (along with the Attorney General as relator). Here, as in *Wilson*,  
5 the Washington Attorney General argued that unnamed state agencies’ documents are outside the  
6 control of the named parties. Here, as in *Wilson*, the Washington Attorney General is essentially  
7 repeating the same asserted arguments which the Washington federal district court rejected.

8 This is not the only instance in which a Washington district court rejected similar state  
9 agency arguments by the Washington Attorney General. In *Geo*, the State of Washington  
10 (represented, as here, by the Washington Attorney General) objected to document requests on the  
11 grounds that the Attorney General’s Office lacked control over state agencies. *GEO Grp., Inc.*, 2018  
12 WL 9457998, at \*2. Geo sought documents from four agencies (including the Department of Social  
13 and Health Services and the Washington Governor’s Office, both at issue in this case as well), and  
14 the Washington Attorney General argued lack of control because those agencies were not parties to  
15 the suit and the lawsuit was initiated as *parens patriae*. *Id.* In seeking to compel party discovery as  
16 against these state agencies, “GEO contends that the AGO has actual control over information held  
17 by state agencies because of the AGO’s requisite relationship with them and statutory power to  
18 represent them.” *Id.* The *Geo* Court found that “[i]n this Court’s view, where the plaintiff is the  
19 State of Washington, discovery addressed to the State of Washington includes its agencies. Because  
20 the AGO is the law firm to the State of Washington, the AGO should respond to and produce  
21 discovery on behalf of the State of Washington, including its agencies.” *Id.* at \*3.

22 The *Geo* opinion distinguished precedent partially on the grounds that the litigation in *Geo*  
23 was initiated *parens patriae* whereas the litigation in the precedent was “effectively, an enforcement  
24 action on behalf of another agency” where the State was a nominal party. *Id.* (distinguishing  
25 *Boardman*, 233 F.R.D. at 265). However, the *Geo* opinion also distinguished *Boardman* on the  
26 grounds that the precedent “relied heavily analyzing the Constitution for the State of New York, a  
27 different state.” *Id.* Further, the *Geo* opinion cited approvingly the *Wilson* opinion discussed above,  
28 and in *Wilson* the finding of control was not based on distinguishing litigation *parens patriae* versus



an agency enforcement action. *Wilson*, 2017 WL 518615, at \*3.

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, Washington is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that Washington was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the Washington Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

Therefore, the Court concludes that the Washington Attorney General has legal control, for the purposes of discovery, over the documents held by the Washington agencies listed by Meta.

#### XXXIV. WEST VIRGINIA

In opposition to the control issue, the West Virginia Attorney General argues primarily the following factors: (1) the West Virginia Attorney General brought the lawsuit under its own independent law enforcement capacity; and (2) the West Virginia Attorney General is a separate entity and independent from the West Virginia agencies. [Dkt. 738-35 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues based primarily on the following factors: the West Virginia Attorney General must act as counsel for the West Virginia agencies absent the existence of statutory exemptions (not present here). *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Bureau for Children and Families,

Department of Education, Department of Health and Human Resources, Development Office, Governor’s Office, State Budget Office, Department of Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the West Virginia Attorney General does have legal control, for purposes of discovery, over the listed West Virginia agencies. While the West Virginia Attorney General is a separate entity and while the West Virginia Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the West Virginia Attorney General will act as the agencies’ counsel.

The statutory scheme in West Virginia requires that “[t]he attorney general shall give written opinions and advice upon questions of law, and **shall** prosecute and defend suits, actions, and other legal proceedings, and generally render and perform all other legal services, whenever required to do so, in writing, by the governor . . . or any other state officer, board or commission, or the head of any state educational, correctional, penal or eleemosynary institution[.]” W. Va. Code § 5-3-1 (emphasis added). Furthermore, “[t]he attorney general **shall** appear as counsel for the state **in all causes** pending in . . . **any federal court**, in which the state is interested; . . . and when such appearance is entered he shall take charge of and have control of such cause[.]” W. Va. Code § 5-3-2 (emphasis added). As discussed above, no separate counsel has appeared for any of the agencies here, and on the record presented, it appears that under the statutory scheme the West Virginia Attorney General will represent these agencies.

Indeed, the West Virginia Attorney General confirmed that its office could represent the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 31]. Accordingly, it appears that under the statutory scheme each agency will be represented by the West Virginia Attorney General in this matter for discovery.

Further, there is no statutory, legal, or administrative rule cited which prohibits the West Virginia Attorney General from accessing the documents of the state agencies at issue. Nor is there citation to any statutory or legal prohibition on the West Virginia Attorney General’s representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization (the attorney general) is both

a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at \*4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

Relatedly, the West Virginia Attorney General has taken the position that communications between the West Virginia Attorney General and these state agencies would be covered by the attorney-client privilege. [Dkt. 738-35 at 2]. To the extent the West Virginia Attorney General argues that his office “does not represent any other state agency” *currently* in this action, but also argues that “*when* the AG is serving as legal counsel for a state agency” then the privilege applies, the West Virginia Attorney General plainly is attempting to preserve the ability to assert the attorney-client privilege between the West Virginia Attorney General’s office and the agencies at issue - and that position further supports the conclusion of control here. Parsing whether the agencies *at the moment of the writing of their brief* may not have been represented by the West Virginia Attorney General, but keeping open the obvious likelihood that they *will* be represented for discovery under the statutory scheme in West Virginia, is a myopic argument which is not firmly grounded in reality and not persuasive. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities . . . . [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at \*2. The fact that the West Virginia Attorney General

is attempting to preserve the ability to assert the attorney-client privilege between the West Virginia Attorney General’s office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156. And, as discussed above, “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. There is no showing here to rebut that presumption.

The West Virginia Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the West Virginia Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). Further, the West Virginia Attorney General argues that the West Virginia Attorney General is a separate and distinct elected entity with separate duties and responsibilities. Dkt. 738-35 at 2 (citations omitted). However, this argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Further illuminating of the issue, the West Virginia federal court in *Baxley* found that a state agency (the West Virginia Division of Corrections and Rehabilitation) had control over documents of a third-party vendor (a medical contractor) such that the state agency was required to search for and produce documents from that third-party, overruling the state agency’s objections that the third-party “is not a parent or subsidiary corporation of Defendants or in any way related thereto, and Defendants do not have custody of the responsive

documentation.” *Baxley v. Jividen*, No. 3:18-CV-01526, 2020 WL 4282033, at \*3–5 (S.D.W. Va. July 27, 2020). Separateness of the entities involved is not determinative of the “control” issue.

Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. Thus, arguing that the West Virginia Attorney General is not suing on behalf of or representing any state agency in this litigation, and arguing that the “COPPA claim is not reliant on or related to any state agencies’ claim(s)[.]” dkt. 738-35 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the lack of operational control is not alone determinative for evaluating “control.” The West Virginia Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Therefore, the Court concludes that the West Virginia Attorney General has legal control, for the purposes of discovery, over the documents held by the West Virginia agencies listed by Meta.

### **XXXV. WISCONSIN**

In opposition to the control issue, the Wisconsin Attorney General’s primary argument is that: the Wisconsin Attorney General only has powers prescribed by law and no such law proscribes the Wisconsin Attorney General to be able to access the documents of Wisconsin agencies. [Dkt. 738-36 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues

based primarily on the following factors: the Wisconsin Attorney General has already confirmed that it is acting as counsel to the Wisconsin Governor in this litigation and that all but one of the listed agencies are controlled by the Wisconsin Governor. *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Department of Administration, Department of Children and Families, Department of Health, Department of Public Instruction, Department of Children’s Mental Health, and Office of the Governor. *Id.*

After considering the briefing, the Court finds that the factors weigh in favor of a finding that the Wisconsin Attorney General does have legal control, for the purposes of discovery, over the listed Wisconsin agencies. Specifically, it has legal control, for the purposes of discovery, over the listed Wisconsin agencies that are controlled by the Wisconsin Governor because the Wisconsin Attorney General is acting as counsel in this litigation for the Wisconsin Governor. As discussed above, no separate counsel has appeared for any Wisconsin agencies. Accordingly, on the record presented to the Court, it appears that the Wisconsin Attorney General (a) has admitted it has been and will represent the Wisconsin Governor in this action, and (b) will represent the Wisconsin agencies controlled by the Governor.

The statutory scheme in Wisconsin requires that the Wisconsin Attorney General through the Wisconsin Department of Justice “*shall . . . appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party.*” Wis. Stat. § 165.25(1) (emphasis added). Additionally, the Wisconsin Attorney General “*shall . . . [i]f requested by the governor or either house of the legislature, **appear for and represent** the state, **any state department, agency**, official, employee or agent, whether required to appear as a party or witness **in any civil** or criminal **matter**, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested.*” Wis. Stat. § 165.25(1m) (emphasis added).

Indeed, the Wisconsin Attorney General confirmed that its office could represent the Wisconsin agencies at issue if Meta were to serve those agencies with a subpoena in this matter.



[Dkt. 738-1 at 31–32]. Additionally, the Wisconsin Attorney General has (through artful language) confirmed that it has acted as counsel to the Governor in this litigation. Dkt. 738-36 at 2 (“Here, with respect to this litigation *and with the exception of the governor, the [Wisconsin Attorney General] has not acted as counsel* to any of the agencies identified by Meta in the Joint Chart.”) (emphasis added). The Wisconsin Attorney General further concedes that all the agencies in the chart are run by a secretary (or in one instance, a director), who each are appointed by the Governor. *Id.* Under Wisconsin law, all secretaries “serve at the pleasure of the governor.” Wis. Stat. § 15.05(1)(a). Similarly, the director of the Office of Children’s Mental Health is run by a director who shall likewise “serve at the pleasure of the governor.” Wis. Stat. § 15.194(1). Because each of these agencies are run by appointees of the Governor and serve at the Governor’s pleasure, their choices of counsel will clearly be determined by the Governor. And because the Wisconsin Attorney General has been and will represent the Governor in this case already and no other counsel has entered appearance for the state agencies, it is not surprising that the Wisconsin Attorney General would also thus represent these state agencies.

Accordingly, it appears that under the statutory scheme each agency will be represented by the Wisconsin Attorney General in this matter for discovery. While the Wisconsin Attorney General argues that there is no statute that expressly grants that office the right to access agencies’ documents, the Wisconsin Attorney General cites no law which prohibits the Wisconsin Attorney General from accessing any agency documents. This arrangement indicates strongly that the Wisconsin Attorney General, in fulfilling its statutory role as counsel for the Governor and the state agencies, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies.

Relatedly, the Wisconsin Attorney General has taken the position that communications between the Wisconsin Attorney General and these state agencies would be covered by the attorney-client privilege “where the AG is serving as legal counsel for a state agency.” [Dkt. 738-36 at 2]. To the extent the Wisconsin Attorney General indicates that “a review will be undertaken to determine whether a legal privilege will apply,” that indicates that the Wisconsin Attorney General is attempting to preserve the ability to assert the attorney-client privilege between the Wisconsin

Attorney General’s office and the agencies at issue, and that position further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156. And, as discussed above, “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at \*2. There is no showing here to rebut that presumption.

The Wisconsin Attorney General cites no law which prohibits the Wisconsin Attorney General from serving as counsel for the state agencies at issue. Indeed, the Wisconsin Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the Wisconsin Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at \*5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”).

Further, the Wisconsin Attorney General argues that the Wisconsin Attorney General is a separate and distinct elected entity with “executive control over only one agency of state government: the Wisconsin Department of Justice.” *See* Dkt. 738-36 at 2 (citations omitted). However, this argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day “executive control” of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of

discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency.

The Western District of Wisconsin’s opinion in *Perez v. Frank*, No. 06-C-248-C, 2006 WL 6040464, at \*1 (W.D. Wis. Nov. 27, 2006), is instructive. In *Perez*, the plaintiff was suing several individual defendants who were officials within the Wisconsin Department of Corrections. *Id.* In that case, the plaintiff requested issuance of a subpoena for documents directed to the Department of Corrections. *Id.* The Wisconsin Court denied the request, tellingly, because “[b]efore I issue the requested subpoena to plaintiff, it will be necessary for him to advise the court why he believes the documents he wants ***are not in the control of the defendants in light of the fact that they appear to be documents belonging to the Department of Corrections.*** If the documents plaintiff seeks to inspect are in the control of the defendants, then he should request the production of documents pursuant to Fed. R. Civ. P. 34.” *Id.* In *Perez*, the defendants were represented by the Wisconsin Attorney General. *Id.* Thus, the holding in *Perez*, known to the Wisconsin Attorney General’s office, is that a Wisconsin federal judge has recognized that individuals, employed by a state agency, but none of whom are alleged to be in “executive control” of that agency, have sufficient apparent control of agency documents such that a subpoena is unnecessary and that party discovery is the appropriate procedural vehicle for document discovery. The *Perez* ruling thus by analogy persuasively supports this Court’s conclusions on control regarding documents in this case for the Wisconsin agencies. *Cf. also Trane Co. v. Klutznick*, 87 F.R.D. 473, 476–78 (W.D. Wis. 1980) (finding named defendant, President of the United States, has control over information in the hands of non-party agencies such that supplemental interrogatory responses are ordered).

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in

1 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*  
2 (*II*) opinion not only ruled against the objecting States, but also helpfully identified numerous States  
3 which withdrew their objections to party discovery and negotiated a resolution of this issue with the  
4 opposing party there. *Id.* at 356 n.5. In that case, Wisconsin is identified as one of the States which  
5 reached agreement on the state agency control issue without requiring that court to expend resources  
6 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the  
7 control issue against all the remaining objecting states and given that Wisconsin was able to reach  
8 a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that  
9 the Wisconsin Attorney General and Meta were unable to reach a negotiated resolution of this  
10 dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management  
11 Conferences, they should make every effort to work out discovery disputes through reasonable,  
12 good faith negotiations between able and experienced counsel, particularly where, as here, there is  
13 guidance in precedent on the discovery issue at hand.

14 Therefore, the Court concludes that the Wisconsin Attorney General has legal control, for  
15 the purposes of discovery, over the documents held by the Wisconsin agencies listed by Meta.

#### 16 ADMINISTRATIVE MOTIONS

17 As discussed above, the State Attorneys General filed an Administrative Motion for Leave  
18 to File Supplemental Information, a Second Administrative Motion for Leave to File Supplemental  
19 Information, and a Third Administrative Motion for Leave to File Supplemental Information. [Dkts.  
20 1031, 1074, 1110]. All three seek leave to file information that Meta has served notices of its intent  
21 to serve subpoenas on some of the agencies at issue. *Id.* Meta’s Response to the first Administrative  
22 Motion indicates that Meta does not object to the submission of these subpoenas as supplemental  
23 information and made clear its position that service of these subpoenas was being conducting  
24 without waiving Meta’s position that the state agencies should be subject to party discovery. [Dkt.  
25 1035 at 2]. As of the date of this Order, Meta takes no position with regard to the Second  
26 Administrative Motion, and the Court presumes that Meta’s position would be the same as with  
27 respect to the First and Third Administrative Motion in any event. [Dkt. 1074 at 6; Dkt. 1110]. No  
28 opposition on the merits being filed, the Court **GRANTS** all three Administrative Motions.

## CONCLUSION

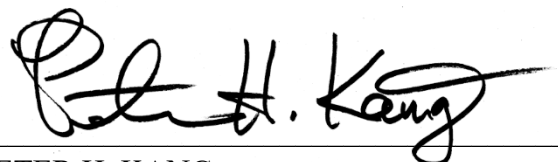
The Court is disappointed that the Parties were incapable of reaching a negotiated resolution of this “control” issue, but rather required the Court to expend its valuable resources analyzing over thirty-five briefs on this “control” issue (where the State Attorneys General requested that the issues here required separate briefing for each State), conduct multiple hearings on this issue (where ultimately only a handful of the States presented oral argument), and prepare this admittedly lengthy Order (where, as discussed above, a large number of the arguments overlapped and repeated, with only slight variations, from state to state). Indeed, rather than reaching negotiated resolution of this issue as in *Generic Pharmaceuticals (II)*, the Attorneys General of multiple states here preemptively declared at oral argument their intent to appeal any adverse ruling on “control” before they even saw this Order or this Court’s reasoning (and where the Court did not rule from the bench). The detailed discussion in this Order is intended, hopefully, to facilitate any later review. The Court again reminds counsel for all Parties of their duties under Fed. R. Civ. P. 1 and 26 to work collaboratively for the efficient progress of this case, and to avoid unduly multiplying the proceedings.

For all reasons discussed herein, Meta’s motion to compel the State Attorneys General to include the identified state agencies within the scope of party discovery is **GRANTED-IN-PART** and **DENIED-IN-PART** consistent with this Order.

The Parties (including counsel for the State Agencies) are **ORDERED** to promptly meet and confer regarding a mutually agreeable and reasonable date for the State Agencies to substantially complete their respective productions of documents in response to either the Rule 34 requests or, to the extent applicable, Rule 45 subpoenas. The Parties shall include a summary report on the status of State Agency discovery in the Discovery Management Conference reports going forward.

**IT IS SO ORDERED.**

Dated: September 6, 2024



PETER H. KANG  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE: SOCIAL MEDIA ADOLESCENT  
ADDICTION/PERSONAL INJURY  
PRODUCTS LIABILITY LITIGATION

Case No. [22-md-03047-YGR](#) (PHK)

**DISCOVERY MANAGEMENT ORDER  
NO. 12 FOLLOWING DISCOVERY  
MANAGEMENT CONFERENCE OF  
NOVEMBER 21, 2024**

This Document Relates to:  
All Actions

Upcoming DMC Dates:

December 11, 2024 at 1:00 pm

January 16, 2025 at 1:00 pm

February 20, 2025 at 1:00 pm

On November 21, 2024, this Court held a Discovery Management Conference (“DMC”) in the above-captioned matter regarding the status of discovery. *See* Dkts. 1370, 1372. This Order memorializes and provides further guidance to the Parties, consistent with the Court’s directions on the record at the November 21st DMC, regarding the deadlines and directives issued by the Court during that hearing (all of which are incorporated herein by reference).

**I. Interim Discovery Deadlines for State AG Cases**

The Court has carefully considered the Parties’ arguments and competing proposals regarding the schedule for their discovery plan and for the corresponding interim discovery deadlines governing the State AG cases against Meta. *See* Dkt. 1336 at 4-13. As stated at the November 21st DMC, the Court **ORDERS** the discovery deadlines in those cases modified as follows:

<u>EVENT OR DEADLINE</u>	<u>DATE</u>
Start date for rolling productions of state agency documents requested pursuant to subpoenas	November 22, 2024



1	Deadline for completion of conferrals re: Rule 34 state agency discovery	December 2, 2024
2	Last date to file discovery letter briefs re: disputes concerning production of state agency documents (Rule 34 requests or subpoenas)	December 9, 2024
3	Start date for rolling productions of state agency documents requested pursuant to Rule 34	December 6, 2024
4	Deadline for Rule 30(b)(6) subpoenas or notices to the State AGs and/or state agencies	December 13, 2024
5	Substantial completion of production for State AG and state agency documents requested pursuant to Rule 45 subpoenas	December 23, 2024
6	Last date for Parties to meet and confer re: scheduling of State AG and state agency Rule 30(b)(6) depositions ( <i>and</i> to meet and confer re: any such disputes)	January 6, 2025
7	Substantial completion of production for State AG and state agency documents requested pursuant to Rule 34	January 10, 2025
8	Last date for file discovery letter briefs re: disputes concerning scheduling or taking of any State AG and state agency Rule 30(b)(6) depositions	January 13, 2025
9	Deadline for Parties to meet and confer to identify and commence scheduling State AG and state agency individual fact witness depositions ( <i>and</i> to meet and confer re: any such disputes)	February 14, 2025
10	Deadline for Meta to serve deposition notices for State AG and state agency individual fact witness depositions	February 21, 2025
11	Last date to file discovery letter briefs re: any disputes concerning scheduling or taking of State AG and state agency fact witness depositions	February 21, 2025
12	Dates for Rule 30(b)(6) depositions of State AGs and state agencies to be taken (unless otherwise agreed upon by the Parties)	February 3, 2025 through March 7, 2025
13	Deadline for Meta to complete depositions of State AG and state agency fact witnesses	April 4, 2025

At the DMC, several of the State AGs (most notably, Arizona and Minnesota) raised concerns regarding their agencies' ability to meet the above deadlines due to insufficient funding, staffing, and technological capabilities. Meta, for its part, complained that multiple state agencies were refusing to provide hit reports. The Court admonishes the Parties to engage in prompt and

transparent negotiations for purposes of identifying reasonable search terms and custodians and exchanging hit reports. The Court has repeatedly advised the Parties to include their respective ESI vendors in such negotiations to address concerns and help resolve disputes regarding technological feasibility.

To the extent that state agencies have collected documents but refuse to provide Meta with search terms or hit reports, it is incumbent upon those agencies to tell Meta how the documents were collected. State agencies are expected to run and share hit reports on their own proposed search terms, at a minimum, assuming they used search terms. If state agencies collected documents for production using some other process, they are likewise expected to disclose transparently the processes used to locate the responsive documents. The Court strongly encourages Meta to work out informal deals with state agencies to facilitate document production, such as agreements to use “go get ‘em” requests in lieu of search terms. The Court also strongly encourages the Parties to actively communicate and negotiate disputes regarding objections to document requests (whether by subpoena or Rule 34 requests) to avoid unnecessary delay.

## **II. State Agency “Holdouts”**

As confirmed by the Parties, the following state agencies continue to refuse to meet and confer with Meta at all regarding search terms and custodians—in clear and direct contravention of this Court’s Orders and Judge Gonzalez Rogers’ Orders—because they apparently do not believe they are subject to party discovery in this case or the jurisdiction of this Court:

- California Office of the Governor
- California Governor’s Office of Business and Economic Development
- California Department of Finance
- California Department of Public Health
- California Department of Consumer Affairs
- California Business, Consumer Services, and Housing Agency
- California Office of Data and Innovation
- South Carolina Office of the Governor

No counsel for these eight state agencies attended the November 21st DMC (either in

person or remotely). As such, the Court **ORDERED** the State AGs to provide this Court with the names, bar numbers, and pertinent contact information for all counsel responsible for and representing these eight state agencies who have taken the position that they are entitled to refuse to comply with the Orders issued in this case and that they are not subject to this Court’s jurisdiction in this action for purposes of discovery. The California AG and the South Carolina AG each subsequently sent emails to the Court responding to the Court’s Order in this regard, but they have not filed their responses on the docket. On or before **December 2, 2024**, both the California AG and the South Carolina AG **SHALL** file their responses on the docket.

### **III. YouTube RFPs**

The Parties report a dispute as to the adequacy of YouTube’s amended responses to Request Nos. 62, 69, 71, 72, 76, and 79 in Plaintiffs’ Request for Production (“RFP”) Set 4. [Dkt. 1305].

#### **RFP No. 62**

RFP No. 62 seeks documents concerning YouTube’s “crisis management or crisis communication structure, organization” and/or policies for responding to “investigations, lawsuits, media inquiries, or government inquiries” related to the safety of minor users. [Dkt. 1306-2 at 11]. Plaintiffs argue that information sought by this request—regarding how YouTube handles crises, investigations, lawsuits, and media and government inquiries, including who is involved, and the methods of communication—is highly relevant and crucial for Plaintiffs to establish “knowledge of relevant risks at YouTube’s highest levels” and to select appropriate deponents. [Dkt. 1305 at 8].

YouTube, in its portion of the joint letter brief, argues that it “has already provided 30(b)(6) testimony, produced documents, and served an interrogatory response that together provide Plaintiffs with the information sought by this request in the most reliable and comprehensive form in which it is available.” *Id.* at 11. Specifically, YouTube argues that: (1) Plaintiffs “elicited over four hours of testimony regarding YouTube’s corporate structure” at a recent deposition, including testimony regarding the structure of the six teams directly responsible for YouTube’s crisis management and the individuals within those teams; (2) YouTube produced

documents showing the structure of those six teams; and (3) YouTube provided “a detailed summary of the reporting lines for each of YouTube’s custodians” in response to Plaintiffs’ Interrogatory No. 1. *Id.* YouTube argues that Plaintiffs can readily ascertain the individuals involved in crisis management and communications from the documents already produced. *Id.*

At the November 21st DMC, Plaintiffs argued that YouTube still has not provided the nonprivileged policies relating to crisis management or responding to investigations, lawsuits, media inquiries, or government inquiries pertaining to the safety of minors. YouTube, in response, argued that no such policies exist.

Accordingly, the Court **ORDERS** YouTube to promptly produce all nonprivileged policies (including any nonprivileged documents discussing such policies) responsive to Plaintiffs’ request at issue. To the extent that YouTube does not possess any nonprivileged policies responsive to the request, YouTube shall file a supplemental response to the request confirming that no such policies exist. YouTube shall log any otherwise responsive documents withheld on the grounds of privilege on a timely privilege log. The Court further **ORDERS** the Parties to meet and confer regarding Plaintiffs’ request for information regarding the methods of communication for these crisis management teams, as it is clear that the Parties’ dispute on this portion of the request is not yet ripe.

RFP No. 69

RFP No. 69 seeks documents that “constitute, identify, or reflect” YouTube’s “[p]olicies, process, and criteria” used to “evaluate or determine compensation” for employees working in or with units with responsibility for issues related to youth safety. [Dkt. 1306-2 at 13].

Plaintiffs argue that “information regarding compensation, performance bonuses, and other incentives that rewarded (or failed to reward) accomplishments by individuals responsible for youth safety are relevant to the issue of whether YouTube prioritized user growth and engagement over safety.” [Dkt. 1305 at 9]. Plaintiffs argue that YouTube’s production thus far—“consisting of five documents concerning generic Google-wide compensation policies”—is inadequate because YouTube improperly limited its production to documents “sufficient to show” YouTube’s compensation policies and the documents produced do not show YouTube’s compensation

policies specifically directed at youth safety. *Id.* YouTube argues that Plaintiffs have failed to explain how compensation policies are relevant to this case. *Id.* at 12. In addition, YouTube argues that it has not produced compensation documents specific to youth safety because no such policies exist. *Id.*

The Parties agree that this request does not seek compensation information for lower-level employees. At the DMC, counsel for YouTube stated that no documents exist which discuss the process or criteria by which the companywide policies are applied to those employees working on youth safety. Counsel for YouTube indicated they were in the process of confirming this. Assuming this to be the case, the Court **ORDERS** counsel for YouTube to promptly serve a supplemental response to RFP No. 69 which states that no such documents exist.

#### Remaining RFPs

RFP Nos. 71, 72, 76, and 79 seeks documents concerning YouTube’s policies for facilitating, documenting, processing, reporting, and retaining complaints related to the safety of youth users of the YouTube platform. [Dkt. 1306-2 at 15-17, 20, 22].

The Parties confirm that their dispute on these requests is limited to: (1) whether YouTube should be required to produce final historical versions of internal policies for RFP Nos. 71, 72, 76, and 79; and (2) whether YouTube should be required to produce final historical versions of its public policies for RFP Nos. 72, 76, and 79.

As stated at the November 21st DMC, the Court **ORDERS** the Parties to meet and confer regarding this dispute and the specific policies at issue. The Parties reported at the DMC that they are in the process of evaluating a proposed stipulation which would resolve this dispute and therefore they are directed to file a joint stipulation and proposed order regarding this dispute.

This **RESOLVES** Dkt. 1305.

#### **IV. Meta Compensation Documents**

The PI/SD Plaintiffs (“Plaintiffs”) move to compel Meta to produce documentation sufficient to show the compensation, bonus, and stock awards/options for eleven Meta witnesses. [Dkt. 1318]. Meta has already agreed to produce performance reviews and self-evaluations for these same eleven deponents. Plaintiffs argue that they also need documents showing specific

compensation amounts for each deponent to be able to get a “complete picture” regarding the extent to which Meta prioritized user engagement and business growth at the expense of youth safety. Meta argues that Plaintiffs’ request for specific dollar figures should be denied because: (1) the specific compensation any particular Meta employee received is irrelevant to Plaintiffs’ claims and theories as they have articulated them; (2) the “generally applicable compensation policies” and individual performance reviews already produced by Meta, when taken together, give Plaintiffs the same information that they seek from the compensation documents; and (3) the request for compensation documents violates the deponents’ California constitutional right to financial privacy.

At the November 21st DMC, Meta confirmed that it has produced performance reviews for at least two of the eleven deponents at issue and that Meta will be producing the remaining reviews on a rolling basis. Plaintiffs reported that they have not yet had an opportunity to review these materials, and thus, could not speak to Meta’s argument that the documents provide a commensurate level of detail as the actual dollar figure for compensation. The Parties are **ORDERED** to continue to meet and confer on this issue as directed by this Court. The Parties shall file a joint stipulation and proposed order regarding this dispute.

This **RESOLVES** Dkt. 1318.

#### **V. Miki Rothschild Deposition**

At the November 21st DMC, the Parties raised a time-sensitive dispute regarding the clawback of three documents asserted to contain privileged communications, where that clawback has impacted and resulted in the last-minute cancellation of the noticed deposition of a senior-level Meta employee, Miki Rothschild. The Parties were directed to promptly file joint letter briefing on this dispute, which they have done. *See* Dkt. 1375.

The Parties **SHALL** promptly file on the docket a joint notice regarding the re-noticed date for Mr. Rothschild’s deposition.

#### **VI. California v. TikTok**

In light of the recent Order relating the California AG’s civil enforcement action against TikTok to this MDL, the Parties are **ORDERED** to provide a brief status update and contingent



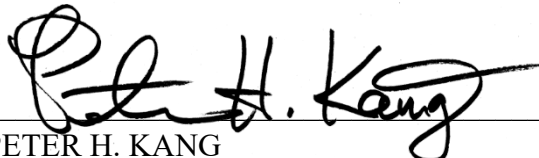
1 discovery plan in the January Joint DMC Statement regarding how they plan to complete  
2 discovery for TikTok in the event the case is not remanded.

3 **VII. Housekeeping Issues**

4 The Parties are directed to reformat their monthly Joint DMC Statements going forward to  
5 more clearly delineate issues that are ripe for discussion at the next DMC and issues that are  
6 unripe. As such, the Joint DMC Statement should be divided into four sections: (1) administrative  
7 issues that the Parties would like to bring to the Court's attention which are not disputed and  
8 which do not require Court action; (2) administrative issues that are disputed and/or require Court  
9 action; (3) truly ripe discovery disputes for which joint letter briefing has already been filed or will  
10 be filed imminently; and (4) unripe discovery disputes. The Court reminds the Parties that any  
11 disputes for which the joint letter briefing is filed less than one week prior to the DMC will be  
12 addressed at that DMC in this Court's discretion.

13  
14 **IT IS SO ORDERED.**

15 Dated: November 26, 2024

16  
17   
18 PETER H. KANG  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE: SOCIAL MEDIA ADOLESCENT  
ADDICTION/PERSONAL INJURY  
PRODUCTS LIABILITY LITIGATION

Case No. [22-md-03047-YGR](#) (PHK)

**ORDER RE: SCHEDULE FOR STATE  
AGENCY DOCUMENT PRODUCTION**

Re: Dkts. 1466 and 1472

United States District Court  
Northern District of California

This MDL has been referred to the undersigned for discovery purposes. *See* Dkt. 426. Now pending before the Court are joint letters submitted by Meta and the States regarding their proposed schedules for completing discovery from the state agencies in this action. [Dkt. 1466; Dkt. 1471]. The Court ordered these Parties to submit these schedules at the December 11, 2024 Discovery Management Conference (“DMC”) in response to the ongoing delays in finalizing search terms, custodians, and other search procedures for many of the state agencies’ documents.

The Court reiterates the relevant legal standards for discovery. Federal Rule of Civil Procedure 26(b)(1) delineates the scope of discovery in federal civil actions and provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.” Information need not be admissible to be discoverable. *Id.* Relevancy for purposes of discovery encompasses “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *In re Williams-Sonoma, Inc.*, 947 F.3d 535, 539 (9th Cir. 2020) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350-51 (1978)); *see also In re Facebook, Inc. Consumer Privacy User Profile Litig.*, No. 18-MD-2843 VC (JSC), 2021 WL 10282215, at \*4 (N.D. Cal.

Sept. 29, 2021) (“Courts generally recognize that relevancy for purposes of discovery is broader than relevancy for purposes of trial.”) (alteration omitted).

While the scope of relevance is broad, discovery is not unlimited. *ATS Prods., Inc. v. Champion Fiberglass, Inc.*, 309 F.R.D. 527, 531 (N.D. Cal. 2015) (“Relevancy, for the purposes of discovery, is defined broadly, although it is not without ultimate and necessary boundaries.”). Information, even if relevant, must be “proportional to the needs of the case” to fall within the scope of permissible discovery. Fed. R. Civ. P. 26(b)(1). The 2015 amendments to Rule 26(b)(1) emphasize the need to impose reasonable limits on discovery through increased reliance on the commonsense concept of proportionality: “The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The [proportionality requirement] is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.” Fed. R. Civ. P. 26 advisory committee’s note to 2015 amendment. In evaluating the proportionality of a discovery request, the Court considers “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to the information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).

The party seeking discovery bears the burden of establishing that its request satisfies the relevancy requirements under Rule 26(b)(1). *La. Pac. Corp. v. Money Mkt. 1 Inst. Inv. Dealer*, 285 F.R.D. 481, 485 (N.D. Cal. 2012). The resisting party, in turn, has the burden to show that the discovery should not be allowed. *Id.* The resisting party must specifically explain the reasons why the request at issue is objectionable and may not rely on boilerplate, conclusory, or speculative arguments. *Id.*; see also *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) (“Under the liberal discovery principles of the Federal Rules defendants were required to carry a heavy burden of showing why discovery was denied.”).

The Court has broad discretion and authority to manage discovery. *U.S. Fidelity & Guar. Co. v. Lee Inv. LLC*, 641 F.3d 1126, 1136 n.10 (9th Cir. 2011) (“District courts have wide latitude

1 in controlling discovery, and their rulings will not be overturned in the absence of a clear abuse of  
2 discretion.”); *Laub v. U.S. Dep’t of Int.*, 342 F.3d 1080, 1093 (9th Cir. 2003). As part of its  
3 inherent discretion and authority, the Court has broad discretion in determining relevancy for  
4 discovery purposes. *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005)  
5 (citing *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)). The Court’s discretion extends to  
6 crafting discovery orders that may expand, limit, or differ from the relief requested. *See*  
7 *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (holding trial courts have “broad discretion to  
8 tailor discovery narrowly and to dictate the sequence of discovery”). For example, the Court may  
9 limit the scope of any discovery method if it determines that “the discovery sought is unreasonably  
10 cumulative or duplicative, or can be obtained from some other source that is more convenient, less  
11 burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C)(i).

12 Throughout this litigation, the Court has encouraged (and continues to insist that) the  
13 Parties approach discovery in a collaborative and rational manner. *See* Fed. R. Civ. P. 1 advisory  
14 committee’s note to 2015 amendment (“Rule 1 is amended to emphasize that just as the court  
15 should construe and administer these rules to secure the just, speedy, and inexpensive  
16 determination of every action, *so the parties share the responsibility to employ the rules in the*  
17 *same way. Most lawyers and parties cooperate to achieve these ends.* But discussions of ways to  
18 improve the administration of civil justice regularly include pleas to discourage over-use, misuse,  
19 and abuse of procedural tools that increase cost and result in delay. *Effective advocacy is*  
20 *consistent with—and indeed depends upon—cooperative and proportional use of procedure.*”)  
21 (emphasis added). This Court has admonished all Parties in this case that counsel have a proactive  
22 duty to conduct discovery under the rules without requiring constant judicial intervention. *See*  
23 *Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 507 (D. Md. 2000) (“The rules of discovery  
24 must necessarily be largely self-enforcing. The integrity of the discovery process rests on the  
25 faithfulness of *parties and counsel* to the rules—both the spirit and the letter.”) (emphasis added);  
26 *Hopei Garments (Hong Kong), Ltd. v. Oslo Trading Co.*, No. 87 CIV. 0932 (MBM), 1988 WL  
27 25139, at \*3 (S.D.N.Y. Mar. 8, 1988) (“[T]he discovery provisions of the Federal Rules are meant  
28 to function without the need for constant judicial intervention, and [] those Rules rely on the

1 honesty and good faith of counsel in dealing with adversaries.”); *see also Chism v. Nat’l Heritage*  
2 *Life Ins. Co.*, 637 F.2d 1328, 1331 (9th Cir. 1981) (“[E]mbroil[ing] the trial judge ‘in day-to-day  
3 supervision of discovery . . . [is] a result directly contrary to the overall scheme of the federal  
4 discovery rules”); *cf. In re Google Litig.*, No. C 08-03172 RMW (PSG), 2011 WL 6951972, at \*6  
5 (N.D. Cal. July 8, 2011) (Parties should not be “free to flout their [discovery] obligations until a  
6 trial court utterly loses patience with them, and thereby embroil trial judges in day-to-day  
7 supervision of discovery.”).

8 At the DMC held on December 11, 2024, and pursuant to Discovery Management Order  
9 No. 13 issued thereafter, the Court ordered Meta and the state agencies at issue to jointly submit  
10 final proposed schedules for getting state agency-related discovery finished within the currently  
11 set case schedule. *See* Dkt. 1479. The Parties promptly did so. *See* Dkts. 1466, 1472. The Court  
12 has carefully reviewed these submissions.

13 The Court attaches as an Appendix to this Order a marked-up version of the proposed  
14 schedules which indicates those proposed deadlines adopted by the Court, those proposed  
15 deadlines rejected by the Court, and modified deadlines as set by the Court in light of the tasks  
16 remaining in discovery, the time available, the current case schedule, and as an exercise of the  
17 Court’s discretion to manage discovery.

18 Given the history of these Parties’ inability to work out their differences in discovery, the  
19 Court was not shocked but nonetheless was disappointed at their failure to submit even *one* jointly  
20 proposed, fully agreed upon schedule as between Meta and the numerous state agencies at issue.  
21 All of the proposed schedules submitted were, at least to some extent, disputed. Further, despite  
22 this Court’s explicit directives at the DMC for these proposed schedules to be submitted, two  
23 States failed to submit *any* proposed schedule for their agencies. Moreover, several States failed  
24 to counter propose a handful of specific dates for individual line-item deadlines or events, where  
25 Meta proposed dates for those specific events. The Court finds that failures by certain States to  
26 counter propose any schedule at all, or to counter propose a date in response to a specific date  
27 proposed by Meta, constitute a knowing waiver of rights.

28 The Court is likewise disappointed at the often times extreme positions set forth in the

Parties’ competing proposed schedules. For example, one State proposed a highly truncated window of only one week in which depositions of the State’s agencies could be taken. Meta, for its part, proposed for all States that the first date Meta could serve deposition notices would be December 30, 2024, with an additional proposal that all States object within three business days (*i.e.*, over the New Year’s holiday) or that the States counter propose deposition dates within seven business days. Despite the Court’s guidance at several DMCs to work things out rationally, these types of competing proposed schedules strain credulity. Given the relatively early first date for Meta to be able to serve deposition notices, there is no need to deviate from Section D of this Court’s Standing Order for Discovery, which sets forth the requirements for the state agencies to object and counter propose alternate dates for depositions, if there are any objections. The Court expects counsel for all Parties to fully comply with the letter and spirit of Section D with regard to deposition scheduling.

The Court is further disappointed that the Parties’ competing proposals included a number of cases in which the competing proposed deadlines differed only by about one or two weeks—experienced counsel on both sides of this dispute know better. The Court is discontented that seasoned attorneys for Meta and the States were incapable of reaching agreement on dates where the difference between the Parties was just a matter of days. At the last two DMCs, the Court heard repeatedly from lawyers for both sides that they were working hard to compromise, that they were trying their best, and that the failure to reach final agreements was the fault of the other side. At this point, such self-serving statements stand in stark contrast to what the Court has seen in the competing proposed schedules. Counsel on both sides should focus on actually compromising to resolve their disputes over search terms, custodians, and search procedures—results and actions will speak louder than generic arguments which strain credulity.

With regard to finalizing agreements on search terms and custodians, the Court is deeply concerned that several States included caveats in their proposed schedules (and a handful included argument about the alleged overbreadth of Meta’s search terms). As noted in the attached Appendix, the Court **ORDERS** all of these Parties to finalize their agreements on search terms without any further undue delay. In the attached Appendix, the Court has set dates for the



1 commencement of rolling productions by the state agencies, as well as dates for substantial  
2 completion of such productions. As a matter of common sense and fair administration of  
3 discovery, Meta and the States need to work backward from those dates to figure out for  
4 themselves the deadlines by which they need to finalize search terms, custodians, and any other  
5 disputed issues. Smart, experienced lawyers understand that they need to finish the search terms  
6 negotiations sufficiently prior to the starting date for rolling productions so that rolling  
7 productions can actually start by the deadlines set.

8 As noted in the Appendix, the Court has set deadlines for the start of rolling productions.  
9 Meta's proposals included multiple such deadlines, which the Court **DENIES** as unnecessary  
10 because the concept of rolling productions (plural) is for documents to be continuously produced  
11 (in daily or at least weekly batches, as they are processed). The Court notes that several States  
12 proposed starting rolling productions much later in the process, which the Court **DENIES** as set  
13 forth in the Appendix. The requirement for the state agencies to start rolling productions means  
14 that the States are to roll the productions continuously as they are processed, so that productions  
15 meet the substantial completion date.

16 The Court has not set a specific date to finalize these negotiations because the Court  
17 assumes the Parties understand the practicalities here and will work to finalize by dates that work  
18 for the specific situation for each state agency. The Court expects counsel to resolve search terms  
19 and custodians without the need for the Court to parse individual search strings for the Parties—as  
20 the Court has stated at prior DMCs, counsel are far better suited to negotiate the search terms  
21 because of familiarity with the details of the case. Thus, as a practical matter, the Court expects  
22 agreements on all search terms and custodians to be finalized within a matter of days from the date  
23 of this Order, absent agreement by the Parties or other highly unusual circumstances.

24 Accordingly, Meta and the States **SHALL** file (for each State) a joint one-page status  
25 report, by no later than **January 6, 2025**, stating simply whether negotiations regarding search  
26 terms and custodians are finalized such that rolling productions can start by the deadline set by the  
27 Court for that State's agencies. Further, the status report for each State **SHALL** indicate whether  
28 any or all of the disputes involving that State in the joint discovery letter brief filed on December

20, 2024 [Dkt. 1482] have been resolved. If any disputes remain unresolved as between Meta and a particular State, the status report for that State shall identify (without further argument) which disputes in the joint letter brief [Dkt. 1482] remain unresolved. These status reports **SHALL NOT** include argument blaming the other side as to why search terms and custodians remain disputed—as far as this Court is concerned, any failure to finalize agreement is a failure by all counsel involved.

If a status report for a particular State indicates that search terms and custodians are still disputed (between Meta and one or more agencies of that State) as of January 6, 2025, the Court **ORDERS** that counsel for Meta, counsel for the state agency (or agencies) at issue, and counsel for the State Attorney General’s office at issue working on this case **SHALL** meet and confer **in person** at a location mutually agreed upon, where that meet and confer shall take on or before **January 14, 2025**. The status report **SHALL** indicate for the Court the date, time, and location of the meet and confer, as well as the names and titles of all lawyers who will be participating in the meet and confer.

If the Parties are unable to agree on a schedule or location for this in-person meet and confer, then they **SHALL** jointly report **in person** to Courtroom F on the 15th Floor of the San Francisco courthouse (located at 450 Golden Gate Ave.) at 10:30 a.m. on a mutually agreed upon date chosen from January 7, 2025 through January 14, 2025 where they will receive instructions from the Court on completing their meet and confer at the courthouse. The status report **SHALL** indicate for the Court the names and titles of the lawyers who will appear and **SHALL** inform the Court of the date of their appearance in Courtroom F. If the Parties are unable even to agree upon a date to appear in this Court, then they **SHALL** so state in the status report and they **SHALL** jointly report **in person** to Courtroom F at 10:30 a.m. on January 7, 2025, unless otherwise ordered by the Court.

The Court again admonishes the Parties that they must work collaboratively and transparently to get all remaining discovery completed in a timely manner. The Court is disappointed that these Parties have proven incapable of working out their disagreements on this discovery resulting in failures to meet the deadlines previously set. The Court has made clear to

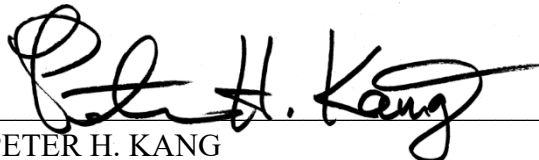
1 these Parties repeatedly that finishing this discovery on the current case schedule is imperative.

2 The Parties should not expect the Court to grant further extensions for completing this  
3 discovery, and the Court will view with a jaundiced eye failures to meet the deadlines set by this  
4 Order given the long pendency of this discovery, the extensive guidance previously provided by  
5 the Court, and the motions practice this discovery has inordinately spawned. The Court will take  
6 fully into account such failures to meet deadlines in evaluating further discovery disputes or other  
7 motions practice.

8 This **RESOLVES** Dkts. 1466 and 1472.

9  
10 **IT IS SO ORDERED.**

11 Dated: December 31, 2024

  
PETER H. KANG  
United States Magistrate Judge

United States District Court  
Northern District of California

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**Exhibit 14**

**Kentucky Attorney General’s Position:** In only two instances does Kentucky law grant the Office of the Kentucky Attorney General (KYOAG) full, unmediated access to another agency’s files. However, neither of those agencies are listed in the March 11, 2024 Joint Chart. While no specific Kentucky statute or constitutional provision explicitly prohibits or prevents the KYOAG from accessing documents of the state agencies identified by Meta, there is no authority granting such access. However, as a practical matter, the existing distribution of authority among Kentucky’s separately elected executive branch officers prevents the KYOAG from exercising control or direct access to other agencies’ records absent express statutory authority.

***The KYOAG lacks a legal right to obtain documents from the entities identified by Meta.*** The Kentucky Attorney General and Governor are separately elected constitutional officers of the Commonwealth. KY. Const. § 91; KY. Const. § 70; Ky. Rev. Stat. § 12.020. Each of the other agencies named by Meta are headed by individuals appointed by the Governor. Ky. Rev. Stat. § 12.040. These department heads “have direction and control of their respective departments.” Ky. Rev. Stat. § 12.040(1). Given this structure of Kentucky government, Meta is unable to demonstrate that the KYOAG has a legal right to obtain documents from other agencies upon demand. While Ky. Rev. Stat. § 367.160(1) dictates that departments and agencies “of the Commonwealth shall fully cooperate with the Attorney General in carrying out the functions of” the Kentucky Consumer Protection Act (KYCPA), this required cooperation does not indicate that the KYOAG has the legal right to obtain another agency’s documents upon demand nor that the documents are within the possession, custody, or control of the KYOAG. Notably, Ky. Rev. Stat. § 367.160 delineates only two specific agencies for which designees of the KYOAG “have the same access to material evidence and information” as those agencies. They are the Public Service Commission (Ky. Rev. Stat. § 367.160(2)) and the Department of Insurance (Ky. Rev. Stat. § 367.160(3)), neither of which were identified by Meta in the Joint Chart.

***Whether the KYOAG’s communications with the entities are privileged.*** The KYOAG does not represent any of the Kentucky agencies at issue. They are distinct and separate entities with their own legal staffing and capacity to independently initiate and participate in litigation and retain counsel as they see fit. Ky. Rev. Stat. §12.210. Although Ky. Rev. Stat. § 15.020 provides that the KYOAG is the chief law officer and legal adviser of all departments, commissions, and agencies of the Commonwealth, the KYOAG is not specifically required to represent agencies and those agencies are free to use their own counsel or employ outside counsel. *See Hogan v. Glasscock*, 324 S.W.2d 815, 817 (Ky. Ct. App. 1959). In fact, the KYOAG on occasion finds itself in direct legal conflict with these agencies.<sup>1</sup> The KYOAG did not bring this suit on behalf of and has not been retained by any other agency. Therefore, any pre-suit communications between the KYOAG and any Kentucky agency are not privileged.

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<sup>1</sup> *See, e.g., Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673 (Ky. 2019) (KYOAG adverse to Governor, Secretary of Education, and Workforce Development Cabinet); *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021) (KYOAG adverse to Governor and Cabinet for Health and Family Services); *Coleman v. Beshear*, 2024 WL 875611 (Ky. Ct. App. 2024) (Governor adverse to Attorney General and all other state constitutional officers) (not final). *See also Cameron v. EMW Women’s Surgical Center, P.S.C.*, 142 S.Ct. 1002 (U.S. 2022) (Kentucky attorney general entitled to intervene after the cabinet secretary for Health and Family Services declined to appeal injunction).

**Meta’s Position:** The Kentucky agencies that Meta has identified—Board of Education, Cabinet for Health and Family Services, Department for Behavioral Health, Developmental and Intellectual Disabilities, Department for Business Development, Department for Public Health, Department of Education, Finance and Administration Cabinet, Governor, and Office of State Budget Director—are subject to discovery as a matter of state and Ninth Circuit law. Kentucky law provides that the “Attorney General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions.” Ky. Rev. Stat. Ann. § 15.020(1). By statute (with limited exceptions not relevant here), the Attorney General “shall . . . attend to . . . any litigation or legal business that any . . . department, commission, or agency may have in connection with, or growing out of, . . . its official duties.” *Id.* § 15.020(3); compare *Hogan v. Glasscock*, 324 S.W.2d 815 (Ky. Ct. App. 1959) (allowing *local* school boards to employ counsel). As the AG admits, no statute or constitutional provision deprives the AG of access to agency documents. To the contrary, “[a]ll departments, agencies, officers, and employees of the Commonwealth shall fully cooperate with the Attorney General” in carrying out its consumer protection enforcement duties. *Id.* § 367.160.<sup>2</sup>

Because the Kentucky AG, as “chief legal officer,” is tasked with attending to the “legal business” of the state agencies at issue here and can require agency “cooperat[ion]” in this consumer protection lawsuit, they have “control” over agency materials—and therefore have discovery obligations with respect to them—under *In re Citric Acid*’s “legal right” standard.<sup>3</sup> See, e.g., *Bd. of Educ. of Shelby Cnty. v. Memphis City Bd. of Educ.*, 2012 WL 6003540, at \*3 (W.D. Tenn. Nov. 30, 2012) (legal right based on AG’s “statutory duties to handle ‘all legal services,’ ‘direct and supervise’ all litigation, and ‘represent’ the State of Tennessee,” and the absence of any authority denying the AG the ability to “obtain responsive documents on demand”); *In re Generic Pharms. Pricing Antitrust Litig.*, 571 F. Supp. 3d 406, 411 (E.D. Pa. 2021) (legal right based on obligation to “represent[] Commonwealth agencies” and statute providing that the AG “shall have the right to access at all times to the books and papers of any Commonwealth agency necessary to carry out his duties” (cleaned up)). Claims that the AG “on occasion” may come into conflict with other state departments do not warrant a different result. See *In re Generic Pharms. Pricing Antitrust Litig.*, 2023 WL 6985587, at \*2 (E.D. Pa. Oct. 20, 2023) (“[g]eneral arguments regarding a possible conflict” do not bar finding that AG exercises control over agency documents, as “state agencies ‘undoubtedly hold many relevant documents and stand to benefit from the Attorney General’s success in the case’”).

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<sup>2</sup> The AG’s observation that Kentucky law affords “the same access to material evidence and information” in the files of only two agencies is irrelevant. *In re Citric Acid* does not require “the same access” before control may attach.

<sup>3</sup> Outside this briefing, Kentucky has not taken a position in this litigation regarding whether communications between the Attorney General’s office and the relevant agencies are privileged.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

People of the State of California, *et al.*

v.

MDL No. 3047

Meta Platforms, Inc., Instagram, LLC, Meta

Case No.: 4:22-md-03047-YGR

Payments, Inc., Meta Platforms Technologies, LLC

**NOTICE OF INFORMATION  
REGARDING STATE-AGENCY  
DISCOVERY ISSUE**

IN RE: SOCIAL MEDIA ADOLESCENT  
ADDICTION/PERSONAL INJURY  
PRODUCTS LIABILITY LITIGATION  
THIS DOCUMENT RELATES TO:

Judge: Hon. Yvonne Gonzalez Rogers

Magistrate Judge: Hon. Peter H. Kang

4:23-cv-05448.

**TO THE COURT, ALL PARTIES, AND THEIR COUNSEL:**

The Office of the Kansas Attorney General respectfully writes to inform the Court of a matter impacting the progress of discovery in this case. The Office of the Kansas Governor, which oversees five of the seven other Kansas state agencies identified in the Court's order (Department for Aging and Disability Services; Department for Children and Families; Department of Administration, Department of Commerce, and Department of Health and Environment), has, of yet, not complied with the Court's September 6, 2024 discovery orders, ECF 1117. The Office of the Attorney General has been in regular communication with both Defendants and the Governor's office and has taken all steps reasonably within its power to secure compliance with the Attorney General's discovery obligations according to the Court's order.

Following the Court's order, the Attorney General provided both the Governor's office and the general counsels of all the relevant agencies with copies of this Court's order and initiated discussions regarding custodians and search terms. Understanding the Governor's ongoing objection to being subject to party discovery, the Attorney General also issued subpoenas under the Kansas Consumer Protection Act (KCPA) seeking the same information sought by Defendants' discovery requests. A copy can be provided to the court upon request.

On October 15, 2024, the Governor's counsel wrote a letter to the Attorney General stating they would respond only to a subpoena or open records request, and restated the Governor's objections to being subject to the Court's orders. A copy of this letter is attached to this filing as Exhibit A. Despite issuance of the aforementioned KCPA subpoenas on October 31, 2024, the Governor's agencies have not complied, arguing that the Attorney General's subpoena authority ends once a case is filed. A copy of this letter is attached as Exhibit B. Following its refusal to comply with the KCPA subpoena, the Attorney General engaged in repeated discussions with the Governor's Office in an attempt to obtain agency compliance with the Court's orders. On November 20, 2024, the Governor's counsel contacted the Attorney General and stated the agencies would only produce documents under a Fed. R. Civ. P. 45 subpoena.

In sum, despite multiple and ongoing attempts to secure the Governor's cooperation, the Attorney General has been unable to move the Governor to comply with this Court's orders. To date, the Governor's agencies have provided custodians and hit reports for search terms prepared by the Attorney General, but, thus far, no agency under the Governor's authority has provided the Attorney General with any responsive documents.<sup>1</sup>

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<sup>1</sup> One agency not under the Governor's jurisdiction has provided documents, which the Attorney General will bates stamp before providing to Defendants.

\* \* \*

The Governor's counsel, Justin Whitten, KS Bar No. 28344, has requested certain correspondence be provided to the Court. Mr. Whitten's letter is attached to this filing as Exhibit C.

The Office of the Attorney General maintains its position, previously presented, that agencies not under the administrative control of the Attorney General or not otherwise intimately connected with the State's case should not be subject to party discovery under the Rules of Civil Procedure. Nonetheless, it understands the Court's previous orders on the matter and understands that, as officers of the court, the Office's attorneys are bound to comply with that order unless or until overturned or amended by higher authority. Consequently, the Office of the Attorney General has made all reasonable efforts to gain compliance with that order from the affected State agencies.<sup>2</sup>

Dated: December 11, 2024

Respectfully submitted,

**KRIS W. KOBACH**

Attorney General  
State of Kansas

*/s/ Sarah Dietz*

---

Sarah Dietz (KS Bar No. 27457)  
Kaley Schrader (KS Bar No. 27700)  
Assistant Attorneys General  
120 SW 10<sup>th</sup> Avenue  
Topeka, Kansas 66612  
Tel: 785-296-3751  
[Kaley.schrader@ag.ks.gov](mailto:Kaley.schrader@ag.ks.gov)  
[Sarah.dietz@ag.ks.gov](mailto:Sarah.dietz@ag.ks.gov)

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<sup>2</sup> Among the agencies' many complaints are that, even if they were to comply, the burden of reviewing the documents would overwhelm their small legal staffs. The Office of the Attorney General has offered to bear the costs of this review and is presently talking to several firms who potentially could perform the necessary work.

Capitol Building  
Room 241 South  
Topeka, KS 66612



Phone: (785) 296-3232  
governor.kansas.gov

Laura Kelly, Governor

October 15, 2024

Sarah Dietz  
Assistant Attorney General  
Officer of Kansas Attorney General Kris Kobach

RE: Discovery in Meta Litigation, *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-md-03047-YGR

Dear Ms. Sarah Dietz,

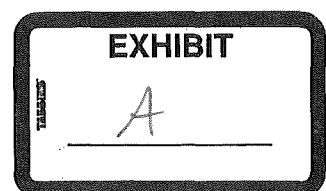
The Kansas Attorney General does not have custody or control, legal or physical, of documents in the possession, custody, or control of the Office of the Governor. I understand there is a decision from a federal magistrate judge in California that may hold otherwise. *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-md-03047-YGR, Order Sept. 6, 2024, pg. 104 (“the Court finds that the factors weigh in favor of finding that the Kansas Attorney General has legal control, for the purposes of discovery, over the listed Kansas agencies.”).

Nothing in this response is intended nor may be interpreted as acquiescence by the Office of the Kansas Governor or any other Kansas agency, apart from the Kansas Attorney General, to the jurisdiction of the court in that case. The Governor did not: initiate that suit, request your office investigate or initiate that suit, enter an appearance in that suit, participate in that suit, nor request your office’s representation in that suit. Simply put, the Governor is not a party to that suit.

Moreover, I do not read the magistrate’s order as making the Governor a party – nor could it in the absence of appropriate service or motion practice under FRCP 19. The magistrate’s order may impose a legal fiction on the Attorney General as to its document control capabilities, but it does not, with respect, impose a legal obligation for production on a non-party such as the Kansas Governor.

As you know the Governor and the Attorney General are legally distinct, separate, elected constitutional officers of our executive branch of government. Kansas Const. art 1, sec. 3. And as a separate legal entity, the Governor will not consent to party discovery in the above-referenced suit. We will comply with a reasonable third-party subpoena or a reasonable request for records under the Kansas Open Records Act.

Our goal is not to be obstinate, but as I believe you can understand, we cannot countenance a position that fundamentally erodes the independence of the Office of the Kansas Governor, especially in a case in which the Governor was not consulted, is not represented, and is not a party. This is not meant as an attack, but you must



understand how we balk at the audacity of a claim that our Attorney General somehow controls our records and we must turn them over in a case we have nothing to do with. The aims of your suit appear laudable, and as you know, the Kansas Attorney General has been empowered explicitly by our legislature to bring the suit in accordance with your enforcement prerogative of the Kansas Consumer Protection Act, K.S.A. 50-628,50-632. The Kansas Governor does not enforce the Kansas Consumer Protection Act, nor did the Kansas Governor file a related complaint under the Kansas Consumer Protection Act.

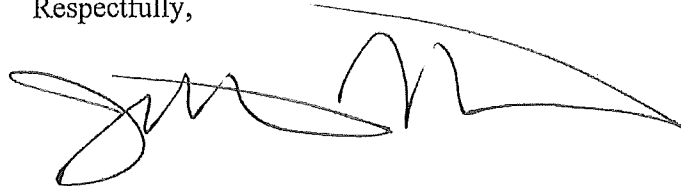
If the parties believed the Kansas Governor to be party, they should have followed the necessary rules of federal civil procedure for joinder of a required party. That the Attorney General of Kansas has joined the suit does not *ipso facto* join all state agencies and executive officers to the suit. Such a position is wholly untenable and inconsistent with the structure of our executive branch and the statute at issue in this case, which vest the Attorney General, not the Governor's Office, with enforcement powers under the Kansas Consumer Protection Act.

Moreover, at no time prior to this discussion of discovery have the parties attempted to treat the Governor as a party – we have not been served with any documents, invited to any scheduling conferences, invited to supply any briefing, or otherwise treated as party. You are aware that when agencies or executive officers like the Governor or the legislature are sued, we may seek representation from your office in accordance with K.S.A. 75-702(b). No such request has been made here by the Office of the Kansas Governor. The court wrote “the Kansas Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation.” Order at 107. The reality is that currently, you are not “counsel for the agencies at issue,” including the Governor’s Office. You will become counsel if requested by the Governor’s Office, which we will only do if we become a party or if we are served with a subpoena. But at this time, no request for representation has been made and thus no counsel relationship exists as would serve as a basis for you to obtain documents consistent with the court’s order.

Again, the Governor is not a party to this suit, nor has she been treated as a party. Accordingly, we decline to engage in party discovery. As stated, we will comply with a reasonable third-party subpoena or a reasonable request for records under the Kansas Open Records Act.

Lastly, we do not want to see you sanctioned for failing to comply with an order you cannot comply with while respecting the structure of our government. Using your office as a clearinghouse for discovery of nearly all executive branch entities may seem administratively efficient but sweeps so broadly in impact, that it is, in my opinion, an unconscionable discovery position and represents a gross misunderstanding of the structure of our state government. We understand that the court’s position is not your position, and I mention it to communicate solidarity that: 1) such a sweeping grant of custodial powers would need to be expressly provided for in state statute - note, our state statutes already expressly indicate no such broad grant of authority as evidenced by our state’s open records act, which imposes record production obligations on “each public agency,” K.S.A. 45-220, as opposed to merely funneling all records request through the Attorney General; 2) as our interactions now show, there actually is no efficiency gained by what should have been discovery through existing third-party discovery avenues likes subpoenas; and 3) efficiency in discovery, if it exists at all here, will never be of such magnitude as to warrant dissolution of the legal boundaries inherent in our executive branch offices that have existed for over a century.

Respectfully,

A handwritten signature in black ink, appearing to read 'Justin Whitten', with a large, sweeping flourish at the end.

Justin Whitten  
Chief Counsel for Kansas Governor Laura Kelly



Capitol Building  
Room 241 South  
Topeka, KS 66612



Phone: (785) 296-3232  
governor.kansas.gov

Laura Kelly, Governor

November 14, 2024

Sarah Dietz  
Assistant Attorney General  
Office of Kansas Attorney General Kris Kobach

RE: Subpoena issued under K.S.A. 50-631 as proxy for Discovery in Meta Litigation, *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-md-03047-YGR

Dear Ms. Sarah Dietz,

We are providing you with our objections to the subpoena we received from your office on November 1, 2024, pursuant to K.S.A. 50-631.

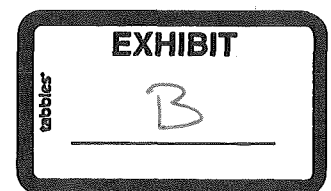
We ask that you withdraw your subpoena as we believe it is an *ultra vires* exercise of subpoena power under the Kansas Consumer Protection Act, K.S.A. 50-631, once a complaint has been filed, as is the case here when the complaint was filed on October 24, 2023. Without waiving any right for us to seek to quash the subpoena, in the alternative, we ask that you modify your subpoena as follows: 1) limiting the timeframe of the request from when Governor Kelly took office on January 14, 2019 to when the complaint in the above-reference litigation was filed on October 24, 2023; 2) limiting the requests to only those germane to alleged violations of the Kansas Consumer Protection Act, which we believe would be withdrawing all but request no. 8.

Further, we discussed the idea of using Boolean search terms as a proxy for complying with the subpoena, we ask that you limit the Boolean search terms as identified herein. Your proposed 57 Boolean searches resulted in 9,572 Outlook items, not including attachments, which far exceeds our ability to review and would create an undue burden on our office. Our proposed modification would entail using 22 of your 57 Boolean searches resulting in a less burdensome 424 responsive items, not including attachments.

Please note we are not intending to be obstructionist in that we believe the Attorney General's Office and Governor's Office are aligned in the legal concerns regarding party discovery in the above-referenced litigation. And we intend to assist where appropriate and reasonable. Nevertheless, to preserve all defenses and rights of our client and to ensure your request does not unduly burden the resources of our office at the expense of service to our client, we wish to make you aware of the following objections:

1. Where, as here, the Attorney General has joined a complaint alleging violations of the Kansas Consumer Protection Act, the investigatory subpoena power under that act is not available for use as a proxy for responding to discovery for what should have been a Rule 45 subpoena from the federal court.

At the outset, we note that unlike a discovery subpoena which would impose a burden on the Governor's Office to object in accordance with K.S.A. 60-245(c), an administrative subpoena such as the one you issued under K.S.A. 50-631 puts the burden on you to substantiate the subpoena furthers your investigation. *See, e.g., People ex rel. MacFarlane v. Am. Banco Corp.*, 194 Colo. 32, 38, 570 P.2d 825, 829 (1977) ("The attorney general's subpoena, under the Colorado Consumer Protection Act, affords greater protection because the burden of



seeking court review is upon the attorney general. He must carry the burden of satisfying the court that reasonable grounds exist to believe the subpoena is necessary to terminate or prevent a deceptive trade practice. The court, therefore, is the protective barrier between the naked demand of the subpoena to produce and an enforceable court order.”).

We did not locate any Kansas appellate case discussing the scope of the Attorney General’s subpoena power under K.S.A. 50-631, but in looking at similar statutes in other jurisdictions, I have found support for the proposition that this administrative/investigatory subpoena ends once a lawsuit is initiated.

In *Cavalry SPV I, LLC v. Morrissey*, 232 W. Va. 325, 337, 752 S.E.2d 356, 368 (2013), the West Virginia Attorney General received complaints of violations of the West Virginia Consumer Credit and Protection Act and issued investigative subpoenas. The Attorney General’s statutory subpoena power was as follows:

If the attorney general has probable cause to believe that a person has engaged in an act which is subject to action by the attorney general, he may, and shall upon request of the commissioner, make an investigation to determine if the act has been committed and, to the extent necessary for this purpose, may administer oaths or affirmations, and, upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition and location of any books, records, documents or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence.  
*Id.* at 332.

The court elaborated on the distinction between investigatory subpoena power and adjudicatory subpoena power, noting that once a complaint has been filed, investigatory subpoena power for violations alleged in the complaint cease.

Once a complaint has been filed formally charging a party with statutory misconduct, however, the Attorney General no longer may rely upon his powers of investigation to elicit information to establish those specific consumer protection violations that form the basis of the complaint. Rather, upon the commencement of enforcement proceedings through the filing of a civil action by the Attorney General, the Attorney General’s investigatory powers end as to those matters addressed in the complaint and are supplanted by the rules of discovery applicable to civil proceedings generally. *Id.* at 337.

See also *People ex rel. MacFarlane v. Am. Banco Corp.*, 194 Colo. 32, 38, 570 P.2d 825, 829 (1977) (noting that an attorney general vested with administrative subpoena power under a consumer protection statute “reflects a compromise that attempts to balance the public’s interest in effective investigation at the *preliminary stage* against the individual’s interest in being free from governmental intermeddling.”) (emphasis added).

As you know, K.S.A. 50-631(a) provides “If, by the attorney general’s own inquiries or as a result of complaints, the attorney general has reason to believe that a supplier has engaged in, is engaging in or is about to engage in an act or practice that violates this act, the attorney general, or any deputy attorney general or assistant attorney general, may administer oaths and affirmations, subpoena witnesses or matter and collect evidence.” There is no time limitation in this provision, which may support some argument that the power survives past the filing of complaint. However, I don’t think that argument carries the day. Clearly the plain language “has reason to believe that a supplier has engaged in, is engaging in or is about to engage in an act or practice that violates this act” indicates investigative intent in that it seeks to detect past or probable violations.

It does not speak to enforcement of violations post-complaint. Coupled with the civil remedy procedures under K.S.A. 50-632 such as an injunction, and the civil discovery mechanisms under K.S.A. Chapter 60, I think the mechanism for discovery post-complaint is party discovery or subpoenas from the court. The appropriate action would be either you or Meta issuing a Rule 45 subpoena.

Moreover, if the subpoena power was intended to persist past the investigatory process, we think the Legislature could have so provided. But it did not, likely leaving such post-investigation discovery to the long-established discovery processes of civil procedure.

We think that the power to subpoena records under K.S.A. 50-631 ceased upon your filing or joining of the complaint, at which time the proper discovery vehicle for further information was party discovery and Rule 45 subpoenas. The subpoena you issued to our office on November 1, 2024, was not in furtherance of an investigation. In fact, a comparison of the subpoena the Governor's Office received from the Attorney General shows the subpoena is near identical to the Rule 45 subpoena served by Meta on the Department for Children and Families. What the Governor's Office received is essentially Meta's Rule 45 discovery subpoena reproduced by the Attorney General as an investigatory subpoena under the Kansas Consumer Protection Act.

The Attorney General Office's presumably completed its investigation which led to the two counts of the violation of the Kansas Consumer Protection Act that it alleged in the complaint filed in the above-referenced litigation. Now, having been confronted with a legally dubious discovery order in federal court in the Northern District of California, the Attorney General attempts compliance with the order through use of its investigatory subpoena power. But the train on the investigation already left the station; the Attorney General is not investigating a violation. Rather, it is responding to discovery about an investigation completed as the precursor to it joining the above-referenced lawsuit.

Administrative subpoenas survive constitutional challenge for unreasonable search and seizure only if they meet the touchstone of reasonableness. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208, 66 S. Ct. 494, 505, 90 L. Ed. 614 (1946) ("The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable."); *see also People ex rel. MacFarlane v. Am. Banco Corp.*, 194 Colo. 32, 38, 570 P.2d 825, 829 (1977) ("In our view, the protections afforded persons served with an attorney general's subpoena are as full and as meaningful as those afforded persons served with a grand jury subpoena. Under both, the person from whom information is sought may refuse to submit to the demands of the subpoena if it is unreasonable.").

Here, it is unreasonable for the Attorney General to attempt to command production of documents sought in discovery from Meta (not even the Attorney General) of an already filed case under the guise of an investigatory subpoena from the Attorney General.

2. Even if the Kansas Consumer Protection Act permits the Attorney General to issue a subpoena post-investigation pursuant to K.S.A. 50-631, the subpoena issued is overly broad and unduly burdensome for the following reasons outlined below.

As applicable to all reasons, the resources of the Governor's Office are limited, consisting of a Chief Counsel and Deputy Chief Counsel and no legal support. So, while serving the legal needs of the Kansas Governor, we simply do not have a lot of additional bandwidth to conduct an extensive review of records. Further, we are technologically limited in that we do not have a centralized way of searching text messages, and I am not sure of our ability to search network drives. We can, as we have explained, perform simple Boolean searches of e-mails, and we are willing to conduct reasonable Boolean searches of e-mails. Moreover, any records that are retrieved will require legal review for any privilege before being produced to your office. As noted, there are

two attorneys for the Governor's Office, and we simply do not have the capacity for large scale document review.

- a. The subpoena seeks records from January 1, 2012, but Governor Kelly is not the custodian of records prior to her becoming Governor on January 14, 2019.

K.S.A. 75-104(e), generally, provides that the Governor's records at the end of the administration are transferred to the custody of the state historical society. It further provides "During the lifetime of the former governor, no person shall have access to any such records, correspondence or other papers which are not required to be disclosed under K.S.A. 45-221 and amendments thereto, except upon consent of the former governor, and the former governor shall be considered the official custodian of such records, correspondence and other papers which are not required to be disclosed."

Meta's instructions in its first set of requests for production said "unless otherwise specified, the time period for these request is January 1, 2015, to the date of production of documents." The subpoena from the Attorney General contained the exact same instruction at paragraph 9 of the instructions. Asking for nearly a decade's worth of records is too much, especially in light of the resource limitations identified above and the fact that Governor Kelly's administration is not the custodian of records of the prior administrations. We ask that you modify your subpoena so that it ranges from January 14, 2019, the date Governor Kelly assumed office, and the earlier of either the date the Kansas Attorney General completed its investigation and determined Meta had violated the Kansas Consumer Protection Act or the date the complaint initiating the action at issue was filed. Asking for records beyond the date of the AG's determination or complaint creates additional unwarranted burden on our resources and has no relevance to the AG's findings regarding violations or enforcement of the Kansas Consumer Protection Act.

For records prior to Governor Kelly's administration – January 1, 2015, to January 13, 2019 – we ask that you please direct your request to the Kansas historical society.

- b. The subpoena is overly broad and creates an undue burden on the Governor's Office

The subpoena contains 22 categories of requests *in addition to* 20 subcategories in request no 3., 3 subcategories in request no. 5, 8 sub-subcategories in request no. 5.c, 6 subcategories in request no. 12, and 2 subcategories in request no 22. As noted above, the Governor's Office resources are limited, and we are not in a position to comply by the requested time frame of November 21 (20 days from date of receipt).

You originally provided a list of 57! different Boolean searches to be run across the mailboxes of the 15 custodians we identified. We ran this search for the time period from when Governor Kelly took office, January 14, 2019, to the date the complaint against Meta was filed, October 24, 2023. Later, on November 8, 2024, you provided 195!! different Boolean searches.

Our Office of Information Technology Services reports the following responsive items to the 57-search list you provided:

Search Criteria	No. Items
("mental health") NEAR(7) ("youth")	3576
("mental health") NEAR(7) ("child")	3392
("mental health") NEAR(7) ("adolescent")	513
("Facebook") NEAR(7) ("youth")	224



("social media") NEAR(7) ("child")	216
("mental health") NEAR(7) ("teen")	197
("mental health") NEAR(7) ("social media")	183
("wellbeing") NEAR(7) ("youth")	162
("social media") NEAR(7) ("budget")	155
("social media") NEAR(7) ("youth")	148
("Facebook") NEAR(7) ("mental health")	99
("complaint") NEAR(7) ("budget")	75
("suicide") NEAR(7) ("social media")	72
("social media") NEAR(7) ("behavior")	69
("Facebook") NEAR(7) ("suicide")	67
("complaint") NEAR(7) ("social media")	59
("social media") NEAR(7) ("harm")	58
("social media") NEAR(7) ("kid")	53
("social media") NEAR(7) ("benefit")	47
("anxiety") NEAR(7) ("social media")	44
("mental health") NEAR(7) ("kid")	37
("depression") NEAR(7) ("social media")	26
("self-harm") NEAR(7) ("youth")	24
("social media") NEAR(7) ("teen")	17
("Facebook") NEAR(7) ("addiction")	14
("Instagram") NEAR(7) ("youth")	8
("social media") NEAR(7) ("filter")	7
("addiction") NEAR(7) ("social media")	6
("Instagram") NEAR(7) ("suicide")	6
("Instagram") NEAR(7) ("mental health")	5
("complaint") NEAR(7) ("cellphone")	3
("Facebook") NEAR(7) ("anxiety")	3
("social media") NEAR(7) ("adolescent")	2
("wellbeing") NEAR(7) ("teen")	2
("digital advertisement") NEAR(7) ("social media")	1
("Instagram") NEAR(7) ("anxiety")	1
("Instagram") NEAR(7) ("depression")	1
("compulsive use") NEAR(7) ("social media")	0
("digital advertisement") NEAR(7) ("facebook")	0
("digital advertisement") NEAR(7) ("instagram")	0
("Facebook") NEAR(7) ("compulsive use")	0
("Facebook") NEAR(7) ("depression")	0
("Facebook") NEAR(7) ("self-harm")	0
("Facebook") NEAR(7) ("sleep disturb")	0
("Instagram") NEAR(7) ("addiction")	0
("Instagram") NEAR(7) ("compulsive use")	0
("Instagram") NEAR(7) ("self-harm")	0
("Instagram") NEAR(7) ("sleep disturb")	0
("mental health") NEAR(7) ("young user")	0

("self-harm") NEAR(7) ("social media")	0
("sleep disturb") NEAR(7) ("social media")	0
("sleep disturb") NEAR(7) ("youth")	0
("social media") NEAR(7) ("compulsive")	0
("social media") NEAR(7) ("physical health")	0
("social media") NEAR(7) ("psychological health")	0
("social media") NEAR(7) ("social health")	0
("social media") NEAR(7) ("young user")	0

Note: the NEAR(7) means 5 words separate the two end words, which we believe was comparable to “w/5” [within 5 words] search between the two end words. These items are outlook data files, most likely e-mails, and the count of responsive hits does not account for e-mail attachments, which would add attorney review time. This is a total of 9,572 items, not including attachments, and there is no way the Governor’s Office legal team can review this number of items without it substantially interfering with our ability to provide counsel to our client Governor Kelly and the Governor’s Office.

K.S.A. 60-245(c)(1) imposes a duty on the issuer of the subpoena to “take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” In determining whether to enforce a subpoena, district courts are empowered to weigh equitable criteria as reasonableness and oppressiveness – it is a balancing of hardships and benefits. *Cessna Aircraft Co. Kansas Comm’n on C.R.*, 229 Kan. 15, 31, 622 P.2d 124, 137 (1981). In *Cessna Aircraft Co.*, the Kansas Supreme Court noted the Kansas Commission on Civil Rights did not have “unlimited subpoena powers and can subject an entire facility to demands and whims without some showing of relevancy to the *investigation*.” *Id.* at 28 (emphasis added). Here, the investigation is done, and the complaint filed. There can be no credible argument that the Attorney General filed first and sought support after the fact, as that would raise ethical concerns as to whether the filing of the complaint was supported by facts at the time it was filed – the law does not countenance a file first, investigate later approach.

In reviewing the list above, we believe these would be more applicable search terms and reasonable number of items for review:

("complaint") NEAR(7) ("social media")	59
("social media") NEAR(7) ("harm")	58
("social media") NEAR(7) ("kid")	53
("social media") NEAR(7) ("benefit")	47
("anxiety") NEAR(7) ("social media")	44
("mental health") NEAR(7) ("kid")	37
("depression") NEAR(7) ("social media")	26
("self-harm") NEAR(7) ("youth")	24
("social media") NEAR(7) ("teen")	17
("Facebook") NEAR(7) ("addiction")	14
("Instagram") NEAR(7) ("youth")	8
("social media") NEAR(7) ("filter")	7
("addiction") NEAR(7) ("social media")	6
("Instagram") NEAR(7) ("suicide")	6
("Instagram") NEAR(7) ("mental health")	5



("complaint") NEAR(7) ("cellphone")	3
("Facebook") NEAR(7) ("anxiety")	3
("social media") NEAR(7) ("adolescent")	2
("wellbeing") NEAR(7) ("teen")	2
("digital advertisement") NEAR(7) ("social media")	1
("Instagram") NEAR(7) ("anxiety")	1
("Instagram") NEAR(7) ("depression")	1

This represents a far more reasonable 424 items, consistent with your obligation to ensure no undue burden on our office.

- c. The subpoena's requests are not reasonably relevant to an investigation of a Kansas Consumer Protection Act violation.

"To be valid, administrative subpoenas must satisfy three requirements: (1) The inquiry is one that the agency or board is authorized to make, (2) the demand must not be too indefinite, and (3) the information sought must be reasonably relevant to the purpose of the inquiry." *Hansa Ctr. for Optimum Health, LLC v. State*, 52 Kan. App. 2d 503, Syl. 4, 369 P.3d 977, 978 (2016).

Here, the Attorney General has issued this administrative subpoena under K.S.A. 50-631, which is limited to investigations of violations of the Kansas Consumer Protection Act. Yet, the subpoena requests the following documents:

Request No. 7: Policies proposed, recommended, or enacted by the Kansas Governor's Office regarding screen time and acceptable use of cell phones, computers, tablets, or other electronic devices by Young Users.

Unless the Attorney General is investigating these current or proposed policies, such policies are not relevant to alleged violations of the Kansas Consumer Protection Act.

Request No. 9: Complaints to the Kansas Governor's Office by teachers or school districts regarding budget crises from inflation, underfunding, unfunded mandates, and other causes.

Such complaints about "budget crises" have no bearing on an alleged violation of the Kansas Consumer Protection Act.

Request No. 10: Documents related to state assessments in Kansas, including reports and analyses regarding the history of K-12 state assessment or standardized testing scores, performance by schools and/or districts, and any other measures of school performance.

Measures of school performance are not relevant to an alleged violation of the Kansas Consumer Protection Act.

Request No. 11: Legislation or policies proposed by, proposed on behalf of, or testified on by the Kansas Governor's Office, regardless of such legislation or policies were enacted, regarding Young User's use of Social Media Platforms.

Proposed legislation or policies are not going to violate the Kansas Consumer Protection Act, which is itself a creature of statute. Legislation can override or supplement existing legislation. This request has no bearing on an alleged violation of the Kansas Consumer Protection Act.

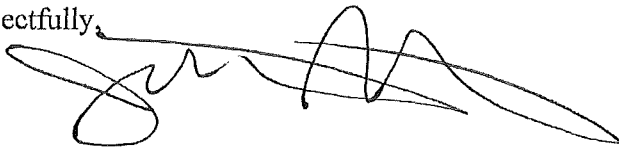
Request No. 12: Mental, social, emotional, or behavioral health services provided by the Kansas Governor's Office to Young Users during the Relevant Period, including:

- a. Counseling or therapy;
- b. Psychiatric services;
- c. Crisis intervention;
- d. Inpatient short-term and long-term programs;
- e. Resource centers; and
- f. Services for Young Users dealing with substance abuse or addiction issues.

The provision of mental health services has no bearing on an alleged violation of the Kansas Consumer Protection Act.

The above are a few examples. And rather than relist the numerous requests in your subpoena, we will suffice with identifying which request we do think germane to an alleged violation of the Kansas Consumer Protection Act: Request No. 8, seeking "complaints to the Kansas Governor's Office by teachers or school districts regarding social media or cell phone use by Young Users and/or the need for acceptable use or other policies to address Young Users' use of social media or cell phones."

Respectfully,

A handwritten signature in black ink, appearing to read "Justin Whitten", written over a horizontal line.

Justin Whitten  
Chief Counsel for Kansas Governor Laura Kelly

Capitol Building  
Room 241 South  
Topeka, KS 66612



Phone: (785) 296-3232  
governor.kansas.gov

Laura Kelly, Governor

December 6, 2024

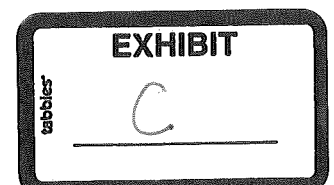
Hon. Judge Yvonne Gonzalez Rogers  
United States District Court, Northern District of California  
Oakland Courthouse  
1301 Clay Street  
Oakland CA 94612

Hon. Magistrate Judge Peter H. Kang  
United States District Court, Northern District of California  
San Francisco Courthouse  
450 Golden Gate Ave,  
San Francisco, CA 94102

Dear Honorable Judge Rogers and Honorable Judge Kang:

The Office of Kansas Governor Laura Kelly respectfully asks for time to expeditiously obtain local counsel to enter a limited appearance to file objections to any order of this Court holding that either: 1) the Kansas Governor is represented by the Kansas Attorney General in this matter; or 2) that the Kansas Attorney General has control over the Kansas Governor's documents. This request is made respectfully and without waiving any right to subsequently object to jurisdiction. Governor Kelly also respectfully requests that any questions regarding interpretation of Kansas law as to document control and/or the existence of an attorney-client relationship be submitted as certified questions from this Court to the Kansas Supreme Court in accordance with the Uniform Certification of Questions of Law Act, as adopted in Kansas Statutes Annotated K.S.A. 60-3201, et seq.

A holding that the Kansas Attorney General controls the documents of a separately elected state-constitutional officer would be a seismic shift in the structure and function of Kansas state government, which recognizes the Kansas Governor and the Kansas Attorney General as legally distinct entities. *See, e.g.*, Kansas Constitution Article 1, Section 1 (providing in part "[t]he constitutional officers of the executive department shall be the governor, lieutenant governor, secretary of state, and attorney general, who shall have such qualifications as are provided by law. Such officers shall be chosen by the electors of this state ..."); *see also First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1083 (D. Kan. 2020) (illustrating legally distinct offices of the Governor and the Attorney General in case where the Kansas Governor was sued in her official capacity; Kansas Attorney General was not sued); *see also State ex rel. Schmidt v. Kelly*, 309 Kan. 887, 888, 441 P.3d 67, 70 (2019) (illustrating in an action where Kansas Attorney General on relation of the state sued the Kansas Governor, that the Kansas Attorney General, Kansas Governor, and the State are not a single entity.)



Moreover, I am not aware of any state law vesting the Kansas Attorney General with custodianship of the Kansas Governor's records; in fact, there is authority suggesting the opposite. *See, e.g.*, Kan. Stat. Annot. 45-220 (providing in the context of production of records in response to open records request that the obligation runs to "each public agency," as opposed to a central repository like the Kansas Attorney General); *see also* Kan. Stat. Annot. 75-104 (providing for the retention and disposition of records of the Governor without any mention of the Kansas Attorney General and specifically noting in subsection (e) and (f) custodianship of certain records either by the former Governor or the Kansas Historical Society).

Further, at no point has an attorney-client relationship existed between the Kansas Governor and the Kansas Attorney General in this matter. Counsels for both entities have been clear with each other on that point. Kansas Statute Annotated 75-702 vests the attorney general with the power to control the state's prosecution in the federal courts. But that provision does not force-place an attorney-client relationship in a situation such as here where the prosecution is by the Kansas Attorney General under the specific Kansas Consumer Protection Act, which vests prosecution authority solely with the Attorney General, not the "state" to wit: the Governor's Office or other state agencies. *See, e.g.*, Kan. Stat. Annot. 50-628 (specifically identifying Kansas Attorney General as entity responsible for enforcement of the Kansas Consumer Protection Act; *see also* Kan. Stat. Annot. 50-632 (identifying Kansas Attorney General and county or district attorney as only entities empowered to bring action for certain forms of relief such as damages or injunction under the Kansas Consumer Protection Act). Simply put, the Governor has no role in the Attorney General's prosecution of the Kansas Consumer Protection Act; in the absence of any involvement, there is no need for an attorney-client relationship on the matter.

In this case, the Kansas Governor has not been represented nor had an opportunity to be heard on these issues of extreme impact to the autonomy and rights of the Kansas Governor. Such issues cannot be fairly decided without input from the Kansas Governor. Moreover, respect for the dual sovereign structure of our state and federal government favors that such questions be decided by the Kansas Supreme Court. Accordingly, we respectfully request an opportunity to retain local counsel and to be heard on these issues and that certified questions regarding document control and the existence of an attorney-client relationship as between the Kansas Governor and the Kansas Attorney General be submitted to the Kansas Supreme Court. We also respectfully ask that any order affecting the Kansas Governor's Office be stayed until after the Kansas Governor has had a chance to be heard on the matter.

Respectfully,

/s/ Justin Whitten

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*Attorney for the Office of the Governor of the  
State of New York*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

IN RE: SOCIAL MEDIA ADOLESCENT  
ADDICTION/PERSONAL INJURY  
PRODUCTS LIABILITY LITIGATION

*People of the State of California, et al.,*

v.

*Meta Platforms, Inc., Instagram, LLC, Meta  
Payments, Inc., Meta Platforms Technologies,  
LLC*

MDL No. 3047

Case Nos.: 4:22-md-03047-YGR (PHK)  
4:23-cv-05448-YGR (PHK)

**NON-PARTY STATUS UPDATE AND  
STATEMENT RE: STATE AGENCY  
DISCOVERY**

Judge: Hon. Yvonne Gonzalez Rogers

Magistrate Judge: Hon. Peter H. Kang

Dear Judge Kang,

We represent the Office of the Governor of the State of New York (the “Executive Chamber”) in connection with discovery that defendants Meta Platforms, Inc., Instagram, LLC, Meta Payments, Inc., and Meta Platforms Technologies, LLC (together, “Meta”) seek from the Executive Chamber and other executive agencies within the New York Governor’s administration including New York Office of Children and Family Services (“OCFS”), New York Council on Children and Families (“CCF”), New York Department of Health (“DOH”), New York Office of Mental Health (“OMH”), New York State Division of the Budget (“DOB”), New York Department of State (“DOS”), and New York Higher Education Services Corporation (“HESC”) (together, the “Executive Agencies”).

We write in reference to Docket Number 1434 in Case Number 4:22-md-03047-YGR-PHK and in response to the Court’s statement during the November 21, 2024, discovery management conference that it would hear from non-party agency counsel regarding the status of discovery. We appreciate the opportunity, as a non-party outside the Court’s jurisdiction, to be heard.

Consistent with the guidance provided by this Court, we respectfully request permission to file the attached discovery status report and position statement, to assist the Court without waiving our jurisdictional objections as non-parties. As detailed in the attached, the Executive Agencies have proactively and repeatedly contacted Meta in an attempt to reach a mutually beneficial resolution that would provide prompt, voluntary discovery from the Executive Agencies and would avoid Court intervention. Meta has refused to engage in good faith or to pursue discovery with appropriate diligence and reasonableness. The attached status report also sets out support for the well-settled position under New York law that the New York Attorney General has no control over the Executive Agencies.

As the Court noted in Docket Number 1434, our presence outside this jurisdiction constrains our ability to appear. As a final note of clarification, we do not seek to file the attached status report under seal or *ex parte*.

Dated: December 11, 2024

Respectfully submitted,

**SELENDY GAY PLLC**

/s/ Faith E. Gay

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December 11, 2024

Via ECF

The Honorable Peter H. Kang  
United States Magistrate Judge  
United States District Court, Northern District  
450 Golden Gate Avenue, 15th Floor, Courtroom F  
San Francisco, CA 94102

**Re:** *People of the State of California, et al. v. Meta Platforms, Inc. et al.*, 4:23-cv-05448-TGR-PHK (N.D.Cal.); *In re Social Media Adolescent Addiction/Personal Inj. Products Liab. Litig.*, 4:22-md-03047-YGR-PHK

Dear Judge Kang,

We represent the Office of the Governor of the State of New York (the “Executive Chamber”) in connection with discovery that defendants Meta Platforms, Inc., Instagram, LLC, Meta Payments, Inc., and Meta Platforms Technologies, LLC (together, “Meta”) seek from the Executive Chamber and other executive agencies in the New York Governor’s administration including Office of Children and Family Services (“OCFS”), Council on Children and Families (“CCF”), Department of Health (“DOH”), Office of Mental Health (“OMH”), Division of the Budget (“DOB”), Department of State (“DOS”), and Higher Education Services Corporation (“HESC”) (together, the “Executive Agencies”).

The New York State Attorney General (“NYAG”) does not represent the Executive Agencies in connection with this matter. The NYAG has conveyed to the undersigned this Court’s guidance at the November 21, 2024 discovery management conference that the Court would hear from non-party agency counsel regarding the status of discovery. We are grateful for this opportunity to be heard, and thus briefly summarize our client’s position and the record below.

As this Court’s Order issued on September 6, 2024 (the “September 6 Order”) recognizes, the Executive Agencies are not parties to the above-captioned litigation, *see, e.g.*, Dkt. 1117 at 1, 20, and the NYAG “is a separate entity” and is prosecuting this lawsuit “in its own independent authority.” *Id.* at 170. As separate, non-party entities located within New York State who were not involved with the filing or prosecution of this

The Honorable Peter H. Kang  
December 11, 2024

lawsuit, the Executive Agencies are not subject to jurisdiction in, and thus are not bound by orders of, the Northern District of California. *See, e.g., Stanford Health Care v. CareFirst of Maryland, Inc.*, 716 F. Supp. 3d 811, 816 (N.D. Cal. 2024) (finding that even a party to a litigation cannot be ‘haled into a jurisdiction solely as a result of ... the unilateral activity of another party or a third person’” (alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)); *see also Burger King Corp.*, 471 U.S. at 471-72 (recognizing that the Due Process Clause prohibits foreign sovereigns from binding even parties to a litigation without jurisdiction over them).

Separately, the September 6 Order’s finding that the NYAG has control over the Executive Agencies’ documents is inconsistent with the New York State Constitution and the New York Executive Law, which do not require the Executive Agencies to provide documents to Meta or the NYAG without issuance of a non-party subpoena. By design under New York law, the NYAG and the Governor are separately elected officials who operate independently of one another, with separate powers, duties, and obligations. *See, e.g.,* N.Y. Const. Art. IV § 1, Art. V § 1. The Governor is head of the Executive Department, N.Y. Exec. L. § 30, and the NYAG is head of the Department of Law, N.Y. Const. Art. V § 4; N.Y. Exec. L. § 60, which is not a division of the Executive Department overseen by the Governor, N.Y. Exec. L. § 31. Indeed, courts in New York have recognized that state agencies are separate and distinct entities that cannot be viewed collectively and thus do not control other state agency documents. *See New York ex rel. Boardman v. Nat’l R.R. Passenger Corp.*, 233 F.R.D. 259 (N.D.N.Y. 2006)<sup>1</sup>; *Wandering Dago Inc. v. New York State Off. of Gen. Servs.*, 2015 WL 3453321, at \*8 (N.D.N.Y. May 29, 2015); *U.S. v. Novartis Pharmaceuticals Corp.*, 2014 WL 6655703, at \*9 (S.D.N.Y. Nov. 24, 2014). This reasoning applies with even greater force when applied to the contention that the NYAG—a constitutionally separate entity—controls documents at the Executive Agencies.

More specifically, under New York law, in actions such as the above-captioned litigation that the NYAG brings pursuant to her authority under Executive Law § 63(12), *see* Compl. ¶¶ 21 & n.4; Prayer for Relief ¶ B(19), the NYAG must seek documents according to New York’s Civil Practice Law and Rules, which, in turn, imposes specific notice and motion requirements for subpoenas served on departments or bureaus of the state or any officer thereof. *See* CPLR §§ 2307, 3120(4) (“Nothing contained in this section [permitting a party to serve discovery requests after an action is commenced] shall

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<sup>1</sup> The Court suggested that *Boardman* was premised on a failure by the party seeking discovery to meet its burden of proving control, *see* Dkt. 1117 at 173-74, but the *Boardman* court found that such a burden could never be met under New York law considering the separate nature of state agencies. *See* 233 F.R.D. at 268 (“Thus, [party] has not *and cannot* meet its burden of proving control.”) (emphasis added)). Indeed, the *Boardman* court expressly stated that having previously served as General Counsel to a state agency, it had “personal knowledge to the fact” that the NYAG does not have access to agency documents without agency permission or a subpoena. *See id.* at 268 n.11.

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December 11, 2024

be construed to change the requirement of section 2307 that a subpoena duces tecum to be served upon a ... department or bureau ... of the state ....”).

Nor is there a “requirement that the [NYAG] will act as [the Executive Agencies’] counsel” “in this matter for discovery.” *Contra* Dkt. 1117 at 170. This is evidenced by the Executive Chamber’s retention of private counsel in this matter. Executive Law § 63(1), cited by Meta and the Court, does not provide otherwise, as that provision contains no language permitting the NYAG to obtain documents or information and instead obligates the NYAG to provide legal representation where the NYAG must protect the interests of New York State. Document requests propounded on the Executive Agencies as non-parties to a litigation do not automatically qualify as such actions or proceedings.

In sum, the general premise of the September 6 Order purports to upend well-settled separation of powers under New York law as to the non-party Executive Agencies and thus has potential implications far beyond this matter.

Significantly, even though the September 6 Order misapprehends New York law as set forth above, and the Executive Agencies have had no opportunity to object given their non-party status, the Executive Agencies nevertheless voluntarily and proactively reached out to Meta beginning in September 2024 to offer reasonable, workable, and efficient resolutions that would avoid Court intervention. The Executive Agencies have no interest in slowing down or withholding discovery in this important matter.

First, the Executive Agencies proposed to Meta that the undersigned act as a single point of contact for the Executive Agencies for purposes of proceeding with discovery under Federal Rule of Civil Procedure 45 (“Rule 45”), if Meta would agree to withdraw its claim that it could obtain documents from the Executive Agencies through the NYAG. Meta took over a month to consider and then rejected that offer, while failing to pursue any discovery from the Executive Agencies.

Despite Meta’s inaction and rejection of its good-faith resolution, the undersigned thereafter voluntarily provided reasonable search parameters for Rule 45 discovery for the four Executive Agencies Meta previously subpoenaed (OMH, DOH, OCFS, and CCF). Meta refused these search parameters and insisted that OMH, DOH, OCFS, and CCF run facially overbroad terms determined unilaterally by Meta that yielded thousands or millions of documents according to the hit counts produced by the agencies. These massive hit counts, which were immediately provided to Meta, are unsurprising given that many of the terms do not refer to Meta, or even social media in general; some search terms reference social media platforms other than Meta; and the terms are standalone and disjunctive. Inexplicably, Meta also continues to hold the Rule 45 subpoenas to OMH, DOH, OCFS, and CCF in abeyance, thereby impeding rolling production from the Executive Agencies.

The undersigned also promptly offered to meet-and-confer with Meta on behalf of the four remaining Executive Agencies Meta has never subpoenaed (Chamber, DOB, DOS, HESC) if Meta would serve Rule 45 subpoenas on them. Meta rejected this offer as well and has not otherwise pursued discovery from these Executive Agencies.

The Honorable Peter H. Kang  
December 11, 2024

It has always been our goal to find a workable solution for all involved. That is why we have been voluntarily and repeatedly reaching out to Meta since September to negotiate a path to production. It seems apparent, however, that Meta would rather pursue misplaced complaints about the NYAG, which does not control the Executive Agencies or their documents, than negotiate reasonable production parameters directly with these non-parties, who have repeatedly offered to make non-party productions.

For the reasons set forth above, the Executive Agencies respectfully request that the Court stay its September 6, 2024 discovery order with respect to the State of New York and allow third-party discovery to proceed pursuant to the Executive Agencies' ongoing meet and confer process with Meta.

Reserving all rights, including the Executive Agencies' non-party status and all jurisdictional objections, we remain available to promptly continue our meet-and-confer with Meta, to promptly produce documents under Rule 45 subpoenas, and to further assist the Court.

Respectfully submitted,

/s/ Faith E. Gay

Faith E. Gay  
Partner

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

<p>IN RE: SOCIAL MEDIA ADOLESCENT  ADDICTION/PERSONAL INJURY PRODUCTS  LIABILITY LITIGATION</p> <p>This Document Relates To:</p> <p><i>People of the State of California, et al. v. Meta  Platforms, Inc., et al.</i></p>	<p>MDL No. 3047</p> <p>Case Nos.: 4:22-md-03047-YGR (PHK)  4:23-cv-05448-YGR</p> <p><b>JOINT STATUS REPORT ON STATE  AGENCIES’ PRODUCTION OF  DOCUMENTS</b></p> <p>Judge: Hon. Yvonne Gonzalez Rogers  Magistrate Judge: Hon. Peter H. Kang</p>
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Dear Judge Kang:

Pursuant to ECF No. 1495, Defendants Meta Platforms, Inc.; Instagram, LLC; Meta Payments, Inc.; and Meta Platforms Technologies, LLC (collectively, “Meta”) and the State Attorneys General (“State AGs”) respectfully submit the attached joint one-page status reports regarding discovery of documents of certain state agencies in 25 States: Arizona, California, Colorado, Connecticut, Delaware, Hawai’i, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Washington, and Wisconsin.<sup>1</sup>

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<sup>1</sup> Meta reports that the Parties resolved their disputes regarding discovery of state agency documents in nine of these States in advance of the December 20, 2024 joint letter briefing: Connecticut, Kentucky, Louisiana, Maine, New Jersey, North Carolina, Oregon, Rhode Island, South Carolina, Virginia, Washington, and Wisconsin. Subsequent to the December 20, 2024 joint letter briefing, the Parties fully resolved their disputes regarding discovery of state agency documents in three States: Indiana, Kansas, and South Dakota. Two States are discussing dismissal of their cases: Michigan and Missouri. As set forth more fully herein, some disputes remain outstanding in eleven States: Arizona, California, Colorado, Delaware, Hawai’i, Illinois, Minnesota, Nebraska, New York, Ohio, and Pennsylvania.

Ten states were not ordered to submit scheduling proposals and therefore were not addressed in the Court’s December 31 Order and are not included here. Four States dismissed their cases: Florida, Georgia, Montana, and North Dakota. Three States reached agreement with Meta on search parameters in advance of the December 11 Discovery Management Conference that precipitated the scheduling submissions: Oregon, South Carolina, and Virginia. Three States are asserting only COPPA claims, and therefore are not subject to the discovery disputes at issue: Idaho, Maryland, and West Virginia.

Dated: January 6, 2025

Respectfully submitted,

**COVINGTON & BURLING LLP**

/s/Ashley Simonsen

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## **SECTION I: STATES WITH NO OUTSTANDING AGENCY DISCOVERY DISPUTES**

### **Connecticut**

Negotiations regarding search terms and custodians for the relevant Connecticut agencies were finalized on December 20, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving Connecticut.

### **Indiana**

Negotiations regarding search terms and custodians for the following Indiana agencies have been finalized, and any disputes involving those agencies contained in the joint letter brief filed on December 20, 2024 have been resolved:

1. Department of Child Services
2. Department of Health
3. Department of Education
4. Indiana Family and Social Services Administration

## **Kansas**

Negotiations regarding search terms and custodians for the following Kansas agencies have been finalized, and any disputes involving those agencies contained in the joint letter brief filed on December 20, 2024 have been resolved:

1. Board of Regents
2. Department of Aging and Disability Services
3. Department of Children and Family Services
4. Department of Education
5. Department of Health & Environment
6. Governor's Office

### **Kentucky**

Negotiations regarding search terms and custodians for the relevant Kentucky agencies were finalized on December 20, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving Kentucky.

### **Louisiana**

Negotiations regarding search terms and custodians for the relevant Louisiana agencies were finalized on December 20, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving Louisiana.

### **Maine**

Negotiations regarding search terms and custodians for the relevant Maine agencies were finalized on December 20, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving Maine.



### **New Jersey**

Negotiations regarding search terms and custodians for the relevant New Jersey agencies were finalized on December 19, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving New Jersey.

### **North Carolina**

Negotiations regarding search terms and custodians for the relevant North Carolina agencies were finalized on December 20, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving North Carolina.

### **Rhode Island**

Negotiations regarding search terms and custodians for the relevant Rhode Island agencies were finalized on December 20, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving Rhode Island.

### **South Dakota**

Negotiations regarding search terms and custodians for the following South Dakota agencies have been finalized, and any disputes involving those agencies contained in the joint letter brief filed on December 20, 2024 have been resolved:

1. Department of Education
2. Department of Health
3. Department of Social Services
4. Board of Regents
5. Office of the Governor
6. Bureau of Finance and Management

### **Washington**

Negotiations regarding search terms and custodians for the relevant Washington agencies were finalized on December 20, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving Washington.

### **Wisconsin**

Negotiations regarding search terms and custodians for the relevant Wisconsin agencies were finalized on December 19, 2024. The joint discovery letter brief filed on December 20, 2024 did not include any disputes involving Wisconsin.



## **SECTION II: STATES THAT INTEND TO DISMISS THEIR CASES**

### **Michigan**

Michigan has agreed in principle to dismiss its case, subject to the parties memorializing their agreement in writing. The parties are discussing the terms of such dismissal.

## **Missouri**

Missouri has agreed in principle to dismiss its case, subject to the parties memorializing their agreement in writing. The parties are discussing the terms of such dismissal.

### SECTION III: STATES WITH OUTSTANDING AGENCY DISCOVERY DISPUTES

#### Arizona

Negotiations regarding search terms and custodians for the following Arizona agencies have been finalized, and any disputes involving those agencies contained in the joint discovery letter brief filed on December 20, 2024 have been resolved:

1. Arizona Department of Education

Disputes involving the following Arizona agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Arizona Board of Education: Disputes remain regarding search terms and reasonable number of documents for review.
2. Arizona Department of Child Safety: Disputes remain regarding search terms and reasonable number of documents for review.
3. Arizona Department of Health Services: Disputes remain regarding search terms and reasonable number of documents for review.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: January 13, 2025

Time: 11:00 AM MT

Location: 2005 N. Central Avenue Phoenix, AZ 85004

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## California

Negotiations regarding search terms and custodians for the following California agencies have been finalized, and any disputes involving those agencies contained in the joint discovery letter brief filed on December 20, 2024 have been resolved:

1. Office of Data and Innovation
2. Business, Consumer Services, and Housing Agency

California agencies have begun to produce documents. Nevertheless, disputes involving the following California agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. California Department of Health Care Services: Disputes remain about custodians and search terms.
2. Mental Health Services Oversight and Accountability Commission: Disputes remain about custodians and search terms.
3. Health and Human Services Agency: Disputes remain about custodians and search terms.
4. Department of Consumer Affairs: Disputes remain about custodians and search terms.
5. Department of Finance: Disputes remain about custodians and search terms.
6. Department of Public Health: Disputes remain about custodians and search terms.
7. Office of the Governor: Disputes remain about custodians and search terms.
8. Governor's Office of Business and Economic Development: Disputes remain about custodians and search terms, or in the alternative, targeted searches.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: January 14, 2025

Time: 10:00 AM PT

Location: Covington & Burling LLP, Salesforce Tower, 415 Mission St Suite 5400, San Francisco, CA 94105

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For California – For California's Executive Agencies – Margaret R. Prinzing, Partner

For other California agencies – Anna Ferrari, Deputy Attorney General

For the California Attorney General's office – David Beglin, Deputy Attorney General

## Colorado

Disputes involving the following Colorado agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Behavioral Health Administration: Disputes remain about custodians, search terms, and the applicable time period.
2. Department of Education: Disputes remain about custodians, search terms, and the applicable time period.
3. Department of Higher Education: Disputes remain about custodians, search terms, and the applicable time period.
4. Department of Human Services: Disputes remain about custodians, search terms, and the applicable time period.
5. Governor's Office: Disputes remain about custodians, search terms, and the applicable time period.
6. State Planning and Budgeting: Disputes remain about custodians, search terms, and the applicable time period.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: January 13, 2025

Time: 1:00 PM

Location: Denver, Colorado

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## Delaware

Disputes involving the following Delaware agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Delaware Department of Education: Disputes remain regarding search terms and hit report timeliness.
2. Delaware Department of Services for Children, Youth & Their Families: Disputes remain regarding search terms and hit report timeliness.
3. Delaware Office of the Governor: Disputes remain regarding custodians, search terms, and applicable time period.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: Friday, January 10, 2025

Time: 12:00 PM ET

Location: Covington & Burling, New York Times Building, 620 Eighth Avenue, New York, NY

Attendees: For Meta – José E. Arvelo, Of Counsel, Covington & Burling LLP

For Delaware – Marion Quirk (Director of Consumer Protection, DE DOJ); Shaun Kelly (Counsel to OGOV); Ryan Costa (Deputy Director of Consumer Protection, DE DOJ) (attending virtually); Ralph Durstein III (Counsel to DE DOE & DE DSCYF) (attending virtually).

## Hawaii

Negotiations regarding search terms and custodians for the following Hawai'i agencies have been finalized, and any disputes involving those agencies contained in the joint discovery letter brief filed on December 20, 2024 have been resolved:

1. Department of Education

Disputes involving the following Hawai'i agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Department of Human Services: Disputes remain regarding search terms, reasonable number of documents for review, and time period.
2. Department of Health: Disputes remain regarding search terms, reasonable number of documents for review, and time period.
3. State Council on Mental Health: Disputes remain regarding applicable time period.
4. Department of Budget and Finance: Disputes remain regarding applicable time period.
5. Office of the Governor: Disputes remain regarding applicable time period.
6. Department of Commerce and Consumer Affairs: Disputes remain regarding applicable time period.
7. Department of Business, Economic Development, and Tourism: Disputes remain regarding applicable time period.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: January 14, 2025

Time: 11:00 AM PT

Location: San Francisco, California

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For Hawai'i – Christopher Han, Deputy Attorney General



## Illinois

Negotiations regarding search terms and custodians for the following Illinois agencies have been finalized, and any disputes involving those agencies contained in the joint discovery letter brief filed on December 20, 2024 have been resolved:

1. Department of Human Services
2. Department of Public Health
3. Office of the Governor
4. State Board of Education

Disputes involving the following Illinois agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Department of Children and Family Services: Search terms, custodians, applicable time period, hit report completeness, hit report timeliness.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: January 10, 2025

Time: 2:00 PM CST

Location: Office of the Illinois Attorney General, 115 S. LaSalle St., 26th Floor, Chicago, IL 60603.

Attendees: For Meta – Michael N. Kennedy, Partner, Covington & Burling LLP

For Illinois – Matthew C. Davies, Assistant Attorney General, Consumer Fraud Bureau, Office of the Illinois Attorney General; Michelle Camp, Special Assistant to the General Counsel, Illinois Department of Children and Family Services

## Minnesota

Negotiations regarding search terms and custodians for the following Minnesota agencies have been finalized, and any disputes involving those agencies contained in the joint letter brief filed on December 20, 2024 have been resolved:

1. Minnesota Department of Education

Disputes involving the following Minnesota agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Minnesota Department of Human Services: Search terms and custodians.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: January 13, 2025

Time: 1:00 PM CT

Location: Chicago, Illinois

Attendees: For Meta – Stephen Petkis, Partner, Covington & Burling LLP

For Minnesota AGO – Caitlin Micko, Assistant Attorney General, Office of the Minnesota Attorney General

For DHS – Aaron Winter, Assistant Attorney General, Office of the Minnesota Attorney General

## Nebraska

Negotiations regarding search terms and custodians for the following Nebraska agencies have been finalized, and any disputes involving those agencies contained in the joint letter brief filed on December 20, 2024 have been resolved:

1. Nebraska Children's Commission
2. Nebraska Department of Education

Disputes involving the following Nebraska agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Nebraska Governor's Office: Search terms and applicable time period.
2. Nebraska Department of Health and Human Services: Search terms and custodians.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: January 13, 2025

Time: 2:00 PM CST

Location: Chicago, Illinois

Attendees: For Meta – Stephen Petkis, Partner, Covington & Burling LLP

For Nebraska – Anna Anderson, Assistant Attorney General, Office of Attorney General

For Nebraska Governor's Office – Maureen Larsen, Legal Counsel

For Nebraska Department of Health and Human Services – Ryan Patrick, Counsel

## **New York**

Disputes involving the following New York agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Council on Children and Families: Search terms, custodians, applicable time period, reasonable number of documents for review.
2. Department of Education: Search terms, custodians, applicable time period, reasonable number of documents for review.
3. Department of Health: Search terms, custodians, applicable time period, reasonable number of documents for review.
4. Office of Children and Family Services: Search terms, custodians, applicable time period, reasonable number of documents for review.
5. Office of Mental Health: Search terms, custodians, applicable time period, reasonable number of documents for review.
6. Office of the Governor: Search terms, custodians, applicable time period, reasonable number of documents for review.
7. State Division of Budget: Search terms, custodians, applicable time period, reasonable number of documents for review, or in the alternative, targeted searches.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: January 10, 2025

Time: 10:00 AM ET

Location: Covington and Burling LLP, 620 Eighth Avenue, New York, NY 10018

Attendees: For Meta – Christopher Y. L. Yeung, Partner, Covington & Burling LLP

For New York – Kevin Wallace, Senior Enforcement Counsel, Economic Justice Division, New York Office of the Attorney General.

For the Office of the Governor, Council on Children and Families, Department of Health, Office of Children and Family Services, Office of Mental Health, and State Division of Budget – Faith Gay, Partner, Selendy Gay; Claire O'Brien, Associate, Selendy Gay

## Ohio

Negotiations regarding search terms and custodians for the following Ohio agencies have been finalized as of January 6, 2025, and any disputes involving those agencies contained in the joint letter brief filed on December 20, 2024 have been resolved:

1. Department of Children and Youth
2. Department of Education and Workforce
3. Department of Higher Education
4. Department of Job and Family Services
5. Department of Mental Health & Addiction Services
6. Department of Youth Services

Disputes involving the following Ohio agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Department of Health: Search terms and custodians.
2. Office of the Governor: Custodians.

In an attempt to resolve these outstanding disputes, Meta and the Department of Health will conduct an in-person meet and confer as set forth below:

Date: January 14, 2025

Time: 10:00 AM ET

Location: Covington and Burling, One City Center, 850 Tenth Street, NW, Washington, DC, 20014.

Attendees: For Meta – Michael N. Kennedy, Partner, Covington & Burling LLP

For Ohio Department of Health – Kevin R. Walsh, Senior Assistant Attorney General; Tyler J. Herrmann, General Counsel, Ohio Department of Health

In an attempt to resolve these outstanding disputes, Meta has proposed that it and the Office of the Governor will conduct an in-person meet and confer as set forth below:

Date: January 10, 2025

Time: 12:00 PM CST

Location: Chicago O'Hare International Airport, exact location TBD.

Attendees: For Meta – Michael N. Kennedy, Partner, Covington & Burling LLP

For Office of the Governor – Shawn J. Organ, Organ Law LLP

## Pennsylvania

Disputes involving the following Pennsylvania agencies from the joint discovery letter brief filed on December 20, 2024 remain unresolved:

1. Pennsylvania Department of Communities and Economic Development: Disputes remain regarding custodians.
2. Pennsylvania Department of Education: Disputes remain regarding custodians.
3. Pennsylvania Department of Health: Disputes remain regarding custodians.
4. Pennsylvania Department of Human Services: Disputes remain regarding custodians.
5. Pennsylvania Governor's Office: Disputes remain regarding custodians.
6. Pennsylvania Office of the Budget: Disputes remain regarding custodians.

In an attempt to resolve these outstanding disputes, the Parties will conduct an in-person meet and confer as set forth below:

Date: Tuesday, January 14, 2025

Time: 2:00-3:00 PM ET

Location: 1650 Arch Street, 25<sup>th</sup> Floor, Philadelphia, PA 19103

Attendees: For Meta – José E. Arvelo (Of Counsel).

For Pennsylvania's Office of General Counsel – Jonathan D. Koltash (Deputy General Counsel)

For Pennsylvania's Office of Attorney General – Jonathan R. Burns (Deputy Attorney General)

**ATTESTATION**

I, Ashley M. Simonsen, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

Dated: January 6, 2025

By: /s/ Ashley M. Simonsen  
Ashley M. Simonsen



Pages 1 - 148

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Peter H. Kang, Magistrate Judge

IN RE SOCIAL MEDIA ADOLESCENT )  
ADDICTION/PERSONAL INJURY )  
PRODUCTS LIABILITY LITIGATION. )

NO. 4:22-md-03047-YGR (PHK)

San Francisco, California  
Thursday, November 21, 2024

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

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BY: **LEXI J. HAZAM**  
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**ATTORNEYS AT LAW**

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STENOGRAPHICALLY REPORTED BY:

Kelly L. Shainline  
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Official Reporter

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For Defendant TikTok, Inc., and ByteDance, Inc.:

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For Defendant YouTube, LLC:

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Los Angeles, California 90013

**BY: MATTHEW K. DONOHUE**  
**ATTORNEY AT LAW**

Thursday - November 21, 2024

1:02 p.m.

P R O C E E D I N G S

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**THE CLERK:** Now calling 22-md-3047, In Re Social Media Adolescent Addiction and Personal Injury Products Liability Litigation.

Counsel, when speaking, please approach and state your appearance for the court reporter very clearly before you start your argument. Thank you.

**THE COURT:** Okay. Good afternoon, all.

**ALL:** Good afternoon.

**THE COURT:** So let's do this first: Let's go through the -- do the parties have a difference of opinion on what the interim deadlines should be for completing the State agency discovery?

Let me take down these dates, and then -- well, why don't you take them down first, and then we'll go from there.

So completion of conferrals regarding Rule 34 State agency discovery, November 22, 2024. Start date, start date for rolling productions of State agency documents requested pursuant to subpoenas -- okay, this is not in your chart -- start date November 22.

Last day to file discovery letter briefs regarding disputes over State agency documents, whether sought by request for production or subpoenas, December 2nd.

1 Start date for rolling productions of State agency  
2 documents sought by Rule 34 document requests, December 6th.  
3 I'm really fixing that because the DMO had it on a Saturday,  
4 which I didn't intend as a deadline.

5 Deadline for 30(b)(6) -- yeah -- 30(b)(6) depo notices to  
6 State AGs or State agencies, December 13th, 2024. I'm not sure  
7 why Meta proposed a Sunday deadline for that. So Friday,  
8 December 13th.

9 Substantial completion of State AG and State agency  
10 documents sought pursuant to subpoenas, December 23rd, 2024.

11 Last day for the parties to meet and confer regarding  
12 scheduling, hopefully finalizing the schedule for 30(b)(6)  
13 depositions of State AGs and State agencies and last day to meet and  
14 confer about any disputes regarding scheduling or taking any of  
15 those depositions, January 6, 2025.

16 Raise your hand if I'm going too fast.

17 Okay. Substantial completion of State AG and State agency  
18 documents produced pursuant to Rule 34 discovery, January 10th.  
19 I modified the DMO on that because I wanted to accommodate the  
20 holidays, basically.

21 Last day to file discovery letter briefs regarding any  
22 unresolved disputes on scheduling or taking of any 30(b)(6)  
23 depositions, January 13th, 2025.

24 Deadline for the parties to meet and confer -- deadline,  
25 so not the first day, hopefully, but the last day to meet and



1 confer to identify and start scheduling State AG and State  
2 agency fact individual witness depositions and meet and confer  
3 regarding any disputes regarding the same, February 14th, 2025.

4 Deadline for Meta to serve depo notices for State AG and  
5 state agency fact witness depositions and last day to file  
6 discovery letter briefs regarding any unresolved disputes  
7 regarding the scheduling or taking of any such depositions,  
8 February 21st, 2025.

9 30(b)(6) depositions of State agencies and AGs to be taken  
10 between February 3rd and March 7th, 2025. The parties may  
11 agree otherwise, but not past the fact discovery deadline. So,  
12 in other words, if you want to, you can try to take them  
13 earlier.

14 Deadline for Meta to complete fact depositions of the  
15 State AG and State agency fact witnesses, April 4th, 2025.

16 So in the interest of time, I'll give the parties brief  
17 opportunity to tell me why some of those dates or any of those  
18 dates don't work.

19 **MR. COCANOUGH:** Good afternoon, Your Honor. Matt  
20 Cocanougher from the State --

21 **THE COURT:** Good afternoon.

22 **MR. COCANOUGH:** Good afternoon, Your Honor. Matt  
23 Cocanougher from the Kentucky Attorney General's Office.

24 **THE COURT:** Good afternoon.

25 **MR. COCANOUGH:** I just want to make some brief

1 points.

2 So we have spoken with the other State Attorney Generals'  
3 Offices who have spoken with their agency counsel, and they are  
4 working as hard as they can, but they have indicated this first  
5 deadline, the completion of conferrals by November 22nd, is  
6 going to be very difficult to meet because we are still -- many  
7 of them are still in the process of conferring with Meta.  
8 Either the State agencies have provided search terms, Meta has  
9 countered, states are preparing to counter.

10 And just so Your Honor knows, they have let us know -- a  
11 majority of states have let us know that that's going to be a  
12 very difficult deadline for them to meet.

13 **THE COURT:** Okay. So that doesn't help me in terms of  
14 a request to -- you're asking till Monday? What are you asking  
15 for?

16 **MR. COCANOUGH:** Any additional time would be  
17 appreciated, Your Honor.

18 **THE COURT:** Any objection from Meta to extend that a  
19 little bit?

20 **MR. YEUNG:** No objection to a brief extension to the  
21 following Monday.

22 I'll note that I'm similarly concerned about the states'  
23 ability to meet the Friday deadline. I think a lot of that is  
24 on what's going on. I mean, we spent -- last time we were here  
25 in the DMO -- DMC, I mean, you ordered 14 states to give us

1 search terms and custodians by November 1.

2 **THE COURT:** That's a different topic.

3 **MR. YEUNG:** Okay.

4 **THE COURT:** We'll get to whether people are complying  
5 with that order or not secondly, but I just -- so I want to set  
6 the dates first.

7 **MR. YEUNG:** Sure.

8 **THE COURT:** Well, given Thanksgiving, can you-all get  
9 it done by Monday, December 2nd? It gives you another week  
10 minus a holiday.

11 **MR. COCANOUGH:** I think that would be --

12 **MR. YEUNG:** I mean, I have my concerns if that's even  
13 going to work, but we -- I mean, I wouldn't give them more  
14 time. This is sort of an issue that, in our view, is the  
15 states' own doing.

16 **THE COURT:** I mean, I'm going to preview a little bit.  
17 To the extent there are states or agencies that are simply  
18 refusing to negotiate with you, that's a different topic.  
19 Okay?

20 **MR. YEUNG:** Yeah.

21 **THE COURT:** For those who are negotiating and who need  
22 the time and are trying to get this done, is December 2nd  
23 adequate?

24 **MR. YEUNG:** It would be. I think what we will need in  
25 the interim is a deadline for states to actually give us hit

1 reports on the terms that we provided. We have --

2 **THE COURT:** I've said this at multiple DMCs. When  
3 you're doing negotiations over search terms, you should be  
4 voluntarily providing hit reports to each other. All right?  
5 And so I'm going to repeat that admonition.

6 I think I've -- I don't want to keep repeating myself, but  
7 part of the whole negotiation over search terms is what I call,  
8 you know, a transparent collaborative discussion. And so I was  
9 disappointed that there was at least some indication that hit  
10 reports haven't provided and that you haven't -- you know, it  
11 appears that you haven't narrowed the disputes over search  
12 terms or the numbers of search terms. Right?

13 So you've got to work harder on this. Once we set these  
14 dates, I'm not going to be in the mood to move them because the  
15 very clear indication from Judge Gonzalez Rogers is to get this  
16 discovery done. Okay?

17 **MR. COCANOUGH:** Understood, Your Honor.

18 **THE COURT:** Okay.

19 **MR. COCANOUGH:** May I make one more brief point?

20 **THE COURT:** Okay.

21 **MR. COCANOUGH:** So it's a two-way street. So we  
22 just ask that Meta -- when we provide search terms, we have  
23 been -- we've gotten back from Meta -- basically most states  
24 have gotten back one large set of search terms, which many  
25 believe are overly broad.

1           And we just want to make sure it's a two-way street. So  
2           we're -- these are tight deadlines, and so we want to make sure  
3           Meta is also coming to the table to limit the discovery to what  
4           is appropriate.

5           **THE COURT:** For the record, I was actually looking  
6           straight at Meta's counsel when I said, "I expect you to be  
7           narrowing the number of search terms and the number of disputes  
8           here and working hard to finish it." So I actually wasn't even  
9           speaking to the State Attorney Generals' counsel when I said  
10          that comment.

11          So I will reiterate. As the party who is proposing and  
12          counterproposing search terms, Meta should be working -- I  
13          mean, discovery is not -- it's never perfect. We know that.  
14          Okay? So you're not going to get every search term you want.

15          Part of the back and forth in the negotiation is to narrow  
16          things down to a point where both sides are either equally  
17          happy or equally unhappy. I don't really care either way as  
18          long as you reach agreement. Do you understand?

19          **MR. YEUNG:** Completely understand. We've -- in our  
20          discussions with the states, we have been very clear if there  
21          are terms that are problematic, let us know what they are and  
22          then we will -- we will take that into consideration and  
23          potentially drop them. We have dropped certain terms with  
24          certain states.

25          The other -- but we don't have hit reports. They claim

1 burden with respect to our terms. We don't have them. I can't  
2 have that discussion without the hit reports.

3 **THE COURT:** You heard me say -- right? -- the hit  
4 reports are needed as a rational part of this discussion.  
5 Okay?

6 **MR. COCANOUGH:** Yes, Your Honor. You were clear.

7 **THE COURT:** Okay. So completion of referrals  
8 regarding Rule 34 State agency discovery, December 2nd, 2024.

9 Any other problems with any of the other interim deadlines  
10 that are set?

11 **MR. YEUNG:** There's another deadline on the 2nd.  
12 That's the last day to discuss Rule 34.

13 **THE COURT:** All right. Let's push that to  
14 December 9th. Last day to file discovery letter briefs on  
15 unresolved disputes regarding State agency documents sought  
16 either by subpoena or RFPs, December 9th.

17 **MR. YEUNG:** Okay.

18 **THE COURT:** Any other problems with the deadlines?

19 **MR. COCANOUGH:** I don't have any additional ones,  
20 Your Honor.

21 **THE COURT:** Okay. So no objections further from the  
22 State AGs.

23 Any objections from Meta?

24 **MR. YEUNG:** No objections.

25 **THE COURT:** Okay. So those will be set in the DMO

1 that will issue after this DMC.

2 Okay. So let's turn to the issue --

3 **MR. WHELIHAN:** Your Honor, if I may, for the State of  
4 Arizona.

5 **THE COURT:** Sure.

6 **MR. WHELIHAN:** Just for the record, these negotiations  
7 have been going on. Arizona is absolutely going to have issues  
8 with a lot of these deadlines.

9 Counsel for Meta insists that there be hit reports  
10 provided. I think we need to understand what these -- at least  
11 the agencies in Arizona, how they're situated, I've had  
12 multiple agencies that I've been working with who have been  
13 running the terms that Meta's got, but it's not -- they don't  
14 have, like, a relativity platform that they can put millions of  
15 documents into and then run search terms and hit reports. So  
16 they're running the terms and they're getting results against,  
17 like, their Outlook 360 environment and they're getting  
18 millions of documents.

19 And then I don't -- you know, I want to -- I want to sort  
20 of get on the record that, like, if we tell Meta that your  
21 search materials produced 138 million documents from this  
22 agency over the last 12 years, are they going to accept that as  
23 a hit report?

24 You know, I think there's -- a lot of this the agencies  
25 are situated they're underfunded, they're understaffed.



1 They're doing the best they can to try to comply with these  
2 deadlines to try to run Meta search terms, to try to come up  
3 with search terms of their own that make sense.

4 But we're very nervous that, you know, even if it's  
5 November 22nd or December 2nd, for example, if we come back and  
6 tell Meta, "These produced millions of documents. Here's what  
7 we think is reasonable," and Meta says, "No," I don't -- you  
8 know, I don't know where we're going to be able to meet in the  
9 middle on that unless Meta significantly narrows its --

10 **THE COURT:** Putting aside search terms, part of my  
11 previous order was also to try to identify custodians. So you  
12 shouldn't be needing to run searches against the entirety of  
13 the entire Outlook e-mail database for an agency.

14 **MR. WHELIHAN:** That's correct, Your Honor. But  
15 there's other problems with that because these agencies, they  
16 change parties, they change people every four years out of  
17 elections. They're trying to figure out who worked there  
18 8 years ago, 12 years ago. They don't know who those people  
19 are, so it's difficult for them to propose custodians that make  
20 sense.

21 When they do propose custodians, you know, Meta -- we've  
22 had the meet and confer, Meta says, "Well, you know, when does  
23 that cover?" Well, it only covers the last two years because  
24 that's when we were elected. That's when the people who we  
25 know who worked here started working here.

1           So I just want to get on the record that, you know, we're  
2     doing everything we can to try to negotiate, to try to be  
3     reasonable; but, you know, the idea that we can just -- that  
4     these agencies are something akin to a company like Meta or,  
5     you know, a well-funded organization that, you know, they have,  
6     like, an IT person and, you know, of counsel that represents  
7     them, and they're not familiar with how to do this.

8           I'm trying to explain things to them. I'm trying to get  
9     them to do things. And, you know, it's happening. We're  
10    giving Meta productions. We're trying to propose things as the  
11    agencies can propose them.

12          And I'm happy to try to organize more meet and confers  
13    before the 2nd to complete conferrals; but if completing  
14    conferrals means coming to an agreement on search terms and  
15    custodians, it may take that long for, you know, the Department  
16    of -- the Arizona Department of Education to figure out who  
17    worked there eight years ago, you know. And so if Meta is  
18    going to be insistent on that timeline, we won't -- they might  
19    not have -- I'm going to hope that they do, but I don't know  
20    they're going to have custodians that go that far back.

21          **THE COURT:** Okay. Well, this is part of the back and  
22    forth. If it is -- if it's impossible or overly burdensome,  
23    truly burdensome, to try to figure out who the custodian was  
24    too long ago, that's part of your negotiation with Meta over  
25    can we do custodians -- okay, maybe two years isn't enough,

1 maybe only four years back -- right? -- and try to find -- I  
2 mean, I shouldn't -- you know how to negotiate these things;  
3 right? I shouldn't have to tell you how to do this; right?

4 So I understand that if one side is asking for custodians  
5 that go too far back in time, the obvious response is to say,  
6 "Can we pull that back" -- right? -- "so we hit the deadlines  
7 that the Court has set?"

8 And I'm going to expect Meta to be reasonable in what it's  
9 seeking here because, again, to their point, if the custodians  
10 from 4, 6, 8, 10 years ago are no longer there and the way they  
11 keep their files it's impossible to figure out who they are,  
12 then you've got to make -- you know, you've got to make that  
13 record, then I'm expecting you to work that out; right?

14 So that, again, Meta wants the documents. You're not  
15 going to get every -- you're not going to get 110 percent of  
16 what you want, so you're going to have, you know, give --  
17 right? -- so that you get closure on a reasonable number of  
18 custodians over a reasonable time frame, you know, with  
19 reasonable search terms so you can get this done in the  
20 schedule we have. Okay?

21 **MR. YEUNG:** Understood. And I think we have been  
22 reasonable with Arizona. They -- just for the record, they  
23 were one of the 14 holdout states. We didn't get search terms  
24 and custodians on November 1. We had to push and push and  
25 push, threaten to conferral.

1        Now we got some -- now we got some proposals for most of  
2        the agencies. It should have happened on November 1. It  
3        didn't happen. We actually gave them our proposed search terms  
4        on November 8. I have no hit report. We have deprioritized  
5        certain agencies at their request as well.

6        This is all part of a broader -- broader picture here  
7        where we actually -- we did propose a schedule for a  
8        search-term negotiations two days out -- two business days  
9        after your September 6 order they fought, and we're here where  
10       we are now.

11       And so, you know, we are -- the thing I don't want to have  
12       happen, the thing that Meta doesn't want to have happen is that  
13       these deadlines give the states an excuse to sidestep some of  
14       the orders and provide us with the discovery, which I'm already  
15       hearing. I already have a state that's telling me, "I don't  
16       want to give you hit reports. I want you to" -- they've had  
17       our search terms for two weeks now. Have never seen a hit  
18       report.

19       What they're telling me is, "In light of the Friday  
20       deadline, which was in the DMO for conferrals, what I want you  
21       to do, Meta, is pick your must-have search terms in a vacuum,  
22       and I'm going to decide whether or not I'm going to run them."  
23       That's what's happening with some of these states, and I want  
24       to make sure -- that's not Arizona, it's a different state, but  
25       I want to make sure we're still getting -- another holdout

1 state -- but I want to make sure we're still getting the  
2 reasonable discovery we're entitled to.

3 **THE COURT:** You could have found any number of places  
4 in transcripts from prior DMCs where I've said, "People need to  
5 exchange hit reports."

6 **MR. YEUNG:** Right.

7 **THE COURT:** And so if there's somebody saying that  
8 they don't have to give you a hit report, that's contrary to  
9 kind of the directives I've given to all the parties in this  
10 case since day one. So are they here? Do you want me to talk  
11 to them? Which counsel is that who's taking that position?

12 **MR. YEUNG:** Matt, are you here? He's not.

13 **MR. COCANOUGH:** It's Illinois.

14 **MR. YEUNG:** Yeah.

15 **MR. WHELIHAN:** I mean, I can say for Arizona the  
16 problem is these agencies run these terms, like I said, against  
17 environments larger -- they try to go back 12 years and they  
18 see millions of documents, and then they're afraid to even  
19 provide anything because they're, like, "We can't -- we can't  
20 possibly review 100 million documents."

21 And Meta is refusing to, you know, narrow the scope of the  
22 subpoenas, narrow the scope of the requests they're making to  
23 these agencies so the agencies don't know who the relevant  
24 custodians would be, who they are. You know, meta hasn't  
25 engaged with these agencies on an individual level, and so it's

1 just, you know, agencies running a massive amount of terms that  
2 include things -- you know, we'll get this later, I'm sure --  
3 things like "phone" and "computer" and "e-mail" and "device"  
4 and "iPhone" and, you know, it pulls back everything they have.

5 And, you know, I --

6 **MR. YEUNG:** And we agreed to drop some of the -- like,  
7 "phone" has been dropped by Meta.

8 **MR. WHELIHAN:** Well, you didn't tell us "phone" was  
9 dropped, and I have people running them right now. I have  
10 people running those queries and it takes them nine hours to  
11 run the queries, and then they get a result and they tell me  
12 that they're afraid to provide it to you. So I --

13 **MR. YEUNG:** It's not a standalone term; but, you  
14 know --

15 **THE COURT:** Address your comments to the Court. We're  
16 not doing a meet and confer here.

17 **MR. WHELIHAN:** Sure.

18 **THE COURT:** Okay? If you want to meet and confer, I'm  
19 going to send you in the hallway to finish your meet and  
20 confer. Do you understand?

21 **MR. WHELIHAN:** Apologies, Your Honor.

22 **THE COURT:** You do need to talk promptly with each  
23 other and transparently with each other, and it sounds like --  
24 you've got a deadline here. All right? And the reason I set  
25 all those dates is I want you to work, and both sides are going

1 to have to give -- all right? -- to hit those deadlines.

2 You know, I understand there's frustration. I hear  
3 frustration on both sides. The obvious thing to do is to  
4 negotiate and horse trade and make a deal here. Okay?

5 For example, if the environment is such that the search  
6 term is that you're demanding and the time frame you're  
7 demanding are pulling up a billion documents, that's not useful  
8 to anybody. Okay?

9 All right. But your people need to provide the hit  
10 reports -- right? -- and, you know, let them know. And so it  
11 goes both ways; right? There has to be discussion and  
12 negotiation here.

13 **MR. WHELIHAN:** As long as there's flexibility on what  
14 a hit report means because it's not going to be, like, you  
15 know, I worked on the discovery report, the hit report, from  
16 relativity and getting an agency to run terms against their  
17 systems.

18 **THE COURT:** That's part of the conversation.

19 **MR. WHELIHAN:** I just hope we don't -- you know, we --

20 **THE COURT:** I don't want to hear that you're disputing  
21 what defines a hit report. Okay? I mean --

22 **MR. YEUNG:** And I've offered the suggestion to various  
23 AGs. Some are using E-Discovery vendor, some are using their  
24 AG services -- servers in order to pull the documents and  
25 search for them. I feel like those are -- these are



1 technological issues that can be surmounted -- that are  
2 surmountable. You can generate -- you should be able to  
3 generate a hit report like we all are used to seeing so that we  
4 know how many documents are brought up by hits, so we can have  
5 an informed discussion about what terms to keep, what terms not  
6 to keep. And that's what we want, and what we haven't received  
7 are any hit reports.

8 **THE COURT:** Okay. I think I've already addressed the  
9 hit report issue.

10 **MR. YEUNG:** Sure.

11 **THE COURT:** Again, I think I've said this at other  
12 previous DMCs, if it's necessary and appropriate, you can  
13 always have technical people on the line -- all right? -- who  
14 are the techies on both sides who can speak to actual  
15 technological feasibility or infeasibility of things --  
16 right? -- and so it isn't just filtered through the lawyers,  
17 which can lead to, you know, misunderstandings down the line.

18 It's been my experience when you have two IT folks talking  
19 to each other, they speak the same language. They know what --  
20 when something is technologically reasonable versus not; right?  
21 And so I'm not going to order that, but I'm going to strongly  
22 suggest that if these -- some of your disputes go to whether  
23 something is technologically feasible or infeasible or  
24 unreasonable. It's useful to have techie people on the line to  
25 figure out a way to break that impasse and find a compromise.

1 Okay?

2 **MR. YEUNG:** And Meta has agreed to -- has welcomed  
3 that discussion. We have had some of those discussions with  
4 the tech people about feasibility.

5 **THE COURT:** Good. Good. As a former engineer myself,  
6 I like having tech people involved. So that's good.

7 **MS. MICKO:** Good afternoon, Your Honor. Caitlin Micko  
8 on behalf of the State of Minnesota.

9 I just wanted to also put on the record that Minnesota is  
10 in a very similar position as Arizona. There's some  
11 technological limitations to what the agencies can do in terms  
12 of hit reports. And so what they are currently doing for the  
13 identified custodians is exporting those files, which requires  
14 the involvement of an entirely different agency.

15 And so we're going through that process, but I just wanted  
16 to be very clear that I know and we plan to, you know, look  
17 through those custodial files. That might be challenging to  
18 make the deadline, but we are trying to be creative with Meta  
19 about other ways to assess their proposed search terms, and  
20 we're continuing to meet and confer on that.

21 **THE COURT:** Okay. I mean, I think, again, it's in the  
22 protective order. There's a clawback provision on privilege,  
23 so you can certainly reach a more explicit agreement about  
24 clawback of inadvertently privileged documents that could  
25 reduce the time to have to review them for privilege. You

1 could do clawbacks for other things too if it will help reduce  
2 the time and burden of pre-reviewing while processing before  
3 production.

4 **MS. MICKO:** Right. I think I'm just trying to speak  
5 to assessing and negotiating the search terms from the start.

6 **THE COURT:** Okay. Well, same admonition I made to the  
7 Kentucky Attorney General goes to Minnesota as well. All  
8 right?

9 **MS. MICKO:** We'll do our best.

10 **THE COURT:** And with Meta too.

11 **MS. MICKO:** Thank you, Your Honor.

12 **THE COURT:** Thank you.

13 **MR. COCANOUGH:** Your Honor, Matt Cocanougher again.

14 Just one clarification. Meta last week served us new  
15 discovery requests, and I'm assuming, but wanted to clarify,  
16 that these deadlines would not apply to the discovery that was  
17 served last week.

18 **THE COURT:** What are these new discovery requests?

19 **MR. YEUNG:** There are only three document requests.  
20 There's a series of interrogatories that are related to COPPA  
21 claims. There's also a request for documents that are  
22 referenced or consulted in connection with interrogatory  
23 responses.

24 There are two other -- you know, separate RFPs, one of  
25 which is -- I don't have the exact language in front of me, but

1 in short, calls for communications between the Attorney  
2 Generals' Offices and various other Attorneys Generals and  
3 agencies. The second is Attorney General communications with  
4 former Meta employees. Those are two -- those are the three  
5 RFPs, if I'm remembering correctly.

6 **MS. KALANITHI:** Yes. Your Honor, Emily Kalanithi from  
7 the California Attorney General's Office. Thank you.

8 Yeah, we were surprised to receive those requests. This  
9 was after the parties had submitted their joint proposed plans.  
10 We believed the AGs Offices in particular had party discovery  
11 complete with, you know, the exception of this outstanding  
12 State agency issue.

13 We completed our productions in August, and these are  
14 requests that could have been -- are largely duplicative of  
15 requests that were made earlier; and to the extent they're not,  
16 could have been made months earlier. So we were unpleasantly  
17 surprised to receive party discovery at this point in time.  
18 We, you know, will respond in due course.

19 We understand Meta's counsel is considering whether to  
20 agree that this is the end-of-party discovery requests or  
21 document requests in this action; but, you know, to the extent  
22 there are these deadlines that are out there, we want to  
23 confirm that we'll be responding under the normal federal rules  
24 to the RFPs.

25 **THE COURT:** Yes, you have the normal time to respond.

1 If Meta's serving -- late serving, just last week, document  
2 requests that are duplicative of previously served document  
3 requests, I don't understand that approach at all given your  
4 arguments about scheduling this discovery. So that --

5 **MR. YEUNG:** I don't --

6 **THE COURT:** It's problematic if that's what's  
7 happening.

8 **MR. YEUNG:** I don't think that they're duplicative.  
9 Again, one set is targeted at COPPA claims, which was not  
10 something that was the focus of the initial set; and, frankly,  
11 most of the requests relating to COPPA are in the form of  
12 interrogatories and not in the form of RFPs.

13 With the other two categories, they were served for a  
14 couple of reasons. Some of it is information that we gleaned  
15 recently about outreach that Attorneys General have had with  
16 Meta -- Meta -- former Meta employees. This is not something  
17 that we knew about back in February. That is certainly  
18 something that is -- you know, we would like to -- like  
19 discovery on. I feel like that's a very discrete, narrow  
20 category.

21 It's -- just to be clear, it's communications with former  
22 Meta employees about this action. It's not broad. It's about  
23 this case.

24 And, similarly, with the Attorney Generals and the agency  
25 discovery, it is, again, about this action. That is, in part,

1 in response to various claims. It's unclear what privilege  
2 folks are invoking, what communications they're claiming.

3 We're happy to have those discovery requests proceed along  
4 the normal track; but from a -- from a document production  
5 standpoint, I'm not even -- they will know better than I, but  
6 I'm not sure -- this is not why -- this is -- these are very  
7 different in terms of what they're seeking.

8 **MS. KALANITHI:** There is at least one of the RFPs --  
9 and we are only talking about the RFPs. I don't think this  
10 relates to the interrogatories that were served. But one of  
11 the RFPs was for all communications with any agency, federal,  
12 state, otherwise, regarding this action, and that is largely  
13 duplicative of a previously served RFP.

14 And so I think what we're looking for at this point is  
15 just confirmation from Meta that we are done with party  
16 discovery or at least RFPs that are directed to the State AGs  
17 at this point in time. And, you know, we will be serving  
18 objections and responses to those RFPs in the due course.

19 **THE COURT:** Are you done?

20 **MR. YEUNG:** I'll have to -- I haven't talked about  
21 that with the team. I'll have to get back to talk to them and  
22 then get back to them, but I understood all that you've said  
23 about the deadlines and how they interplay with various items.

24 **THE COURT:** Okay. I don't want late-served discovery  
25 to start interfering with the rest of discovery, especially if

1 you think it's narrowed and focused. And if it is narrowed and  
2 focused and you can narrow it and focus it even more to make it  
3 even more precise for the other side, then do so. Okay?

4 Because that's off schedule from this other stuff because you  
5 just served it last week. They've got the time to respond and  
6 you just have to work it through.

7 **MR. YEUNG:** Understood.

8 And I'll just add one more note. There are three states  
9 that in the last DMC stood up -- or maybe it was the CMC -- and  
10 indicated that they're only asserting COPPA claims, and we've  
11 already told those three states that they don't need to -- they  
12 can focus on the COPPA requests that were just recently served.

13 **THE COURT:** I saw that in the statement.

14 **MR. YEUNG:** Yeah. Yeah.

15 **THE COURT:** Okay. All right. Hopefully you'll report  
16 to me at the next DMC that this is all resolved and you're all  
17 going forward and it's all -- it's all squared away.

18 Okay. Anything else on the scheduling issue?

19 (No response.)

20 **THE COURT:** Okay. So let's talk about the issue that  
21 you were hinting at, which is -- so it's unclear to me from the  
22 DMC statement. Are there states or are there not states or  
23 State agencies that are simply refusing to negotiate with you  
24 over custodians and search terms because they haven't been  
25 served with a subpoena and they don't feel like, in their view,



1 they're supposed to comply with either my order on party  
2 discovery or Judge Gonzalez Rogers' order saying my order is  
3 not stayed and you're supposed to proceed? So are there any  
4 real true holdouts I guess is the real question.

5 **MR. YEUNG:** I think the short answer is, yes, there  
6 are some states that, you know, have provided custodians and  
7 search terms for maybe a single agency and are not -- resisting  
8 doing the same for the rest of the agencies. That has  
9 happened.

10 In recent -- in this past week we've gotten custodians for  
11 California, for example, but we still don't have search terms  
12 or a commitment that those -- that we'll receive custodians for  
13 more than the, I think it was, three agencies that provided  
14 them.

15 Missouri told me yesterday they're going to get me stuff  
16 on Monday, so I don't have it yet. I have a commitment to say,  
17 you know -- but they were directed to give us the search term  
18 custodians on November 1 and they're -- you know, after a lot  
19 of conferrals, Monday is when they're going to give it to me.  
20 I'll see what I get.

21 But there are various states like that where I look -- you  
22 know, they're not -- they're not in compliance with the order  
23 directing disclosure of this information by the 1st. Some  
24 states have moved closer towards compliance in the interim, but  
25 there are still some states where I would not say they're

1 substantially in compliance with those -- with your November 1  
2 deadline.

3 **THE COURT:** Are there any states or agencies that are  
4 simply not going to provide you custodians or search terms and  
5 have said, "We're just not gonna"?

6 **MR. YEUNG:** Where is California?

7 I mean, California would be one. I think -- it's --  
8 they -- have I received a flat no, completely no? I don't know  
9 it's been phrased that way, but it's been set -- what's been --  
10 there's been no commitment on dates and there's no commitment  
11 that they will provide custodians and search terms for  
12 particular agencies.

13 And when we press for H.2. conferral so we can bring this  
14 issue before Your Honor, I get the, "Well, we need to wait 10  
15 business days and then we have 5 business days to letter brief  
16 it." So there are a number of states where I couldn't bring  
17 these issues to Your Honor's attention as a ripe issue.

18 **THE COURT:** So I'm looking at page 12 of the DMC  
19 statement. This is Meta's section. You identify the  
20 following: Arizona, California, Delaware, Minnesota,  
21 Pennsylvania, and Rhode Island as states which did not propose  
22 search terms or custodians for agencies by November 1, have not  
23 committed to any date by which such terms or custodians will be  
24 provided, and have not agreed to a meet and confer.

25 So is that -- does that subparagraph (b) of your paragraph

1 one there, does that remain true?

2 **MR. YEUNG:** Let me just pull that up.

3 So I can say that Arizona has provided, I believe, search  
4 terms and custodians for all but two agencies putting aside  
5 ones that we deprioritized.

6 California has given --

7 **THE COURT:** Slow down.

8 **MR. YEUNG:** Oh, sorry.

9 **THE COURT:** So Arizona has provided custodians and  
10 search terms for all but two agencies. And what's the excuse  
11 for the two agencies they haven't provided?

12 **MR. YEUNG:** One we've, I believe -- I think -- let me  
13 just check my notes. I don't want to misstate.

14 **THE COURT:** Let me be clear. Of those two agencies  
15 that haven't done it, is it because they're refusing or it's  
16 just been -- they're taking, again, the position that they  
17 don't have to, they're not gonna, they haven't been subpoenaed,  
18 they're not --

19 **MR. YEUNG:** I think one of them, if I'm remembering  
20 correctly, is taking the position that they need us to narrow  
21 our request further before they can do that. Is that -- that's  
22 one of them.

23 Is that -- that's right?

24 **MR. WHELIHAN:** If you'd like me to speak to that now,  
25 Nathan Whelihan for Arizona Attorney General's Office.

1           One of them is the Department of Child Safety. The  
2 Department of Child Safety received a subpoena from Meta in  
3 July. They responded to that subpoena in August asking Meta to  
4 narrow the scope of what they were seeking from the Department  
5 of Child Safety.

6           I now understand that Meta has either lost or they don't  
7 know why but they don't have a record of having ever received  
8 that. During our meet and confer earlier this month, the  
9 Department of Child Safety tried to engage them on that and  
10 tell them what they were asking for in the subpoena and, you  
11 know, likewise what would be in Rule 34 discovery would be so  
12 broad as to encompass essentially every record the agency  
13 possesses, including many, you know, records either in or  
14 related to individual child case files of children who are in  
15 abusive homes or neglect, or that kind of thing, or taken out  
16 of their home or trying to be reunified with their family.

17           And they told Meta they agree to the idea of custodians  
18 and search terms, but they would need Meta -- something in  
19 writing to take to their client narrowing the scope of what  
20 they were asking for and explain what they were asking for in  
21 order for them to propose meaningful search terms and  
22 custodians.

23           **THE COURT:** I'm still trying to identify any states or  
24 agencies that are simply refusing to engage. It sounds like  
25 that agency is engaging or tried to engage. So that's one

1 agency.

2 There's a second Arizona agency that hasn't yet? What's  
3 their position?

4 **MR. WHELIHAN:** I received search terms and the  
5 custodian proposals from the Arizona Department of Education  
6 this morning as I was boarding my delayed flight here today. I  
7 will provide that once I get to a laptop later today.

8 And there is one more agency that I had anticipated they  
9 would have given to me yesterday, but they -- I haven't -- they  
10 haven't yet.

11 **THE COURT:** Okay.

12 **MR. YEUNG:** So I think that -- and then we've got the  
13 bulk -- the rest of it. I'll double-check, but I believe that  
14 we have at least something from everybody else in Arizona.

15 **THE COURT:** Okay. All right. So there's no agency  
16 and there's no part of Arizona that's simply refusing to engage  
17 is what I'm hearing.

18 **MR. WHELIHAN:** With the exception of the Department of  
19 Child Safety is asking that Meta engage with them in order for  
20 them to be able to propose --

21 **THE COURT:** Meta will engage with them, yes?

22 **MR. YEUNG:** And we have. On the phone call that's  
23 referenced, we said three or four times we're not looking for  
24 individual case files; and the response I got was, "Put it to  
25 me in writing because it's not" -- they want it in writing.

1           So it was a call with, I think, three or four different  
2 agencies. It was set for a particular time period. We tried  
3 to engage, we tried to tell them, like, "Look, this is not what  
4 we're looking for." And they kept on bringing it up, kept on  
5 bringing it up. So we are where we are.

6           We're not going to do that -- we don't need to -- right,  
7 we don't need to -- we're taking a look at the requests and  
8 trying to engage in the way that they want us to engage, but we  
9 definitely did try and engage with them on the conferral.

10           **THE COURT:** Look, if they're asking for them in  
11 writing, it doesn't take that long to send them an e-mail,  
12 so...

13           **MR. YEUNG:** What they wanted in writing was  
14 everything. Yes. It was not just that one issue. I think at  
15 the end of the call, they were comfortable with my oral  
16 representation that that's not what we were looking for, but  
17 they wanted -- they were looking for more. They wanted us to  
18 go back and put in writing some type of narrowing of our  
19 request, which is a little bit more involved exercise than that  
20 one single component.

21           **MR. WHELIHAN:** My understanding is that their counsel  
22 is confused about what Meta is looking for. Counsel for Meta  
23 told them that they wanted aggregate information. We're not  
24 really sure what "aggregate information" means.

25           They told them they wanted studies and reports. The

1 department doesn't prepare studies and reports.

2 They told them that they wanted -- so they're looking for  
3 a clarification, and they need something in writing to say  
4 that, "Yeah, we don't want anything related to child case  
5 files," because that's the vast majority of what the agency is  
6 and what it has. So they just want that to take to their  
7 client so their client can understand that.

8 And we've sent three e-mails to Meta that have gone  
9 unreplied to asking for them to engage on the Department of  
10 Child Safety after we sent them the objections that were sent  
11 over the summer that Meta somehow misplaced.

12 **THE COURT:** Okay. You know, if you're complaining  
13 about delay and you've been delaying, I mean -- again, I do  
14 want prompt discussions back and forth. Get it done. That's  
15 all I'm saying. Okay?

16 I don't want to hear -- what's happened in the past has  
17 happened. All right? It's very clear to me you need to --  
18 both sides need to kind of alter their behavior to some extent.  
19 I mean, when -- I don't want to tell people how to practice  
20 law.

21 If an attorney needs something in writing confirming what  
22 the other side has said, there's nothing stopping your side  
23 from sending a letter to Meta saying, "You agreed to this" --  
24 right? -- and then taking it to the client.

25 **MR. WHELIHAN:** Understood, Your Honor.



1           **THE COURT:** I mean, that happens in discovery all the  
2 time. Okay? You send a letter -- you have a meet and confer.  
3 You send a letter that says, "You agreed to this" -- right? --  
4 "and if you disagree with the way we summarized it, let us know  
5 immediately."

6           **MR. WHELIHAN:** The problem is we need clarification of  
7 what "aggregate data" means. We don't --

8           **THE COURT:** But there are different issues here;  
9 right? Like, for example, if a big issue is, like, if they  
10 don't want -- you don't want to give and they don't want  
11 individual child case files, that's a short letter or e-mail.  
12 All right? You don't have to do it all in one if it's going to  
13 be a holdup. That's all I'm saying.

14           I don't care how you get it done, but you've got to get it  
15 done. Okay?

16           **MR. YEUNG:** This is not an issue that is unique to  
17 this type of agency in Arizona. The other agencies we've had  
18 discussions with on this point have been fine taking our oral  
19 representation.

20           I believe it's actually now in the DM -- one of the  
21 statements, either the CMC or DMC statement, that we are not  
22 looking for individual case files. So we've been trying to  
23 work with them. We've had 50 conferrals -- I looked it up --  
24 50 conferrals -- over 50 conferrals with states in November.  
25 That's --

1           **THE COURT:** I expected a lot because there are a lot  
2 of agencies you're going through.

3           **MR. YEUNG:** Of course. And there's -- and they are  
4 doing that and that's why it's taking some time. And, you  
5 know, we're doing -- we're hopeful -- we're hoping that we can  
6 do this orally via representations, which is what many folks  
7 have been able to do; but if they want a letter, they want  
8 something in writing, we are preparing that as we speak.

9           **THE COURT:** With all deliberate speed. Okay?

10          **MR. YEUNG:** Yes.

11          **THE COURT:** All right. So are there -- go back to  
12 my -- we got off track again.

13          Are there states or agencies that are simply refusing to  
14 provide custodians or search terms?

15          **MR. YEUNG:** So we can go to California next.  
16 California has given me custodians for three agencies, no  
17 search terms so far, no commitment to provide custodians for  
18 any other agency.

19          **MS. O'NEILL:** Your Honor, Megan O'Neill for the  
20 California Department of Justice.

21          Just to briefly recap, yes, Meta issued Rule 45 subpoenas  
22 to five California agencies. Three of those agencies have  
23 agreed to provide search terms and custodians. Meta agreed to  
24 deprioritize one of those agencies.

25          One has not yet provided as much terms and custodians, but

1 the AG's Office is working to facilitate conferrals on this  
2 issue, and we hope that a conferral will take place soon.

3 The remainder of the California agencies have taken the  
4 position that they will not provide documents to the AG's  
5 Office for party discovery in this case.

6 We have still -- the AG's Office has still --

7 **THE COURT:** Stop there. How many agencies and which  
8 are they?

9 **MS. O'NEILL:** There are eight agencies. I need a  
10 minute to provide the exact list. If I can have the Court's  
11 indulgence to gather that.

12 **THE COURT:** Do you know which agencies they are?

13 **MR. YEUNG:** I'll have to look at the -- look at my  
14 computer.

15 **MS. O'NEILL:** I have the list now.

16 **THE COURT:** Okay.

17 **MS. O'NEILL:** The California School of Finance  
18 Authority, the California Office of the Governor --

19 **THE COURT:** Slow down.

20 **MS. O'NEILL:** Apologies.

21 **THE COURT:** Okay.

22 **MS. O'NEILL:** The California Governor's Office of  
23 Business and Economic Development.

24 **THE COURT:** Okay.

25 **MS. O'NEILL:** The California Department of Finance.

1           **THE COURT:** Okay.

2           **MS. O'NEILL:** The California Department of Public  
3 Health, the California Department of Consumer Affairs, the  
4 California Business Consumer Services and Housing Agency.

5           **THE COURT:** Consumer Services and Housing Agency?

6           **MS. O'NEILL:** Yes, that's right.

7           And then California Office of Data and Innovation.

8           And I will just say, Your Honor, that the AG's Office has  
9 been attempting to facilitate conferrals with these agencies  
10 and Meta, and we have suggested to Meta that they issue 45  
11 subpoenas to those agencies.

12           **THE COURT:** So I appreciate your offer to, quote,  
13 "help facilitate discussions," but at this point, in light of  
14 my order, subpoenas are not needed. And so what is the stated  
15 position of these eight agencies? Are they simply disagreeing  
16 with my order?

17           **MS. O'NEILL:** My understanding is that the position of  
18 these agencies is that they are not parties to this litigation  
19 and, therefore, are not subject to the jurisdiction of this  
20 Court and its orders and, therefore, they are not providing  
21 documents to the AG's --

22           **THE COURT:** Is there counsel for any of those agencies  
23 here?

24           **MS. O'NEILL:** I don't believe so.

25           **THE COURT:** What does it mean in our system of

1 government for an agency in the face of an order from a federal  
2 judge to say, "We simply are not going to comply with it"? How  
3 does that -- how does that -- what happened to the rule of law?

4 **MS. O'NEILL:** Your Honor, I don't represent the  
5 agencies and I'm not really able to comment more fulsomely on  
6 their position.

7 **THE COURT:** By tomorrow you are ordered to submit to  
8 me a list of every counsel for each of these agencies who is  
9 responsible for taking this position. I want their name. I  
10 want their State Bar number. I want their addresses, their  
11 contact information.

12 **MS. O'NEILL:** Understood, Your Honor.

13 **THE COURT:** I have conferred with  
14 Judge Gonzalez Rogers on this. The reason I'm going through  
15 this list to find out what agencies and states are not  
16 complying with the orders -- it's not just my order, it's her  
17 order as well -- is she will be considering sanctions. Okay?

18 So it's up to you-all in conferral with your colleagues to  
19 figure out if that's the path you want to go down. All right?  
20 And it's her who's going to be considering sanctions. It's not  
21 just me considering discovery sanctions. All right? Do you  
22 understand?

23 **MS. O'NEILL:** I understand, Your Honor.

24 **THE COURT:** Do you agree with those agencies that they  
25 can just defy my order?

1           **MS. O'NEILL:** Your Honor, it's not my position --

2           **THE COURT:** Have you told their counsel that they are  
3 in defiance of my order and in defiance of  
4 Judge Gonzalez Rogers' order?

5           **MS. O'NEILL:** Your Honor, we have informed them of the  
6 order. We have provided all of the information that's  
7 necessary for them to make their decisions.

8           **THE COURT:** That's not my question. Have you told  
9 them that they are in defiance of both my order and her order?

10          **MS. O'NEILL:** I have not told them that, no.

11          **THE COURT:** Has anyone in your office told them that?

12          **MS. O'NEILL:** Not that I'm aware of, but I am not  
13 aware of all the conversations that have happened.

14          **THE COURT:** This is very troubling to me.

15          Okay. Are there any other State agencies or AGs that are  
16 not complying with providing custodians or search terms at all?

17          **MR. YEUNG:** Yeah. I'll run through the list that I  
18 have.

19          Delaware is going to give us --

20          **THE COURT:** That's not my question. If people are in  
21 negotiations with you or said they're going to give you stuff,  
22 that's not my question.

23          **MR. YEUNG:** Okay.

24          **THE COURT:** I want to know are there agencies or  
25 states as a whole that are simply refusing to provide

1 custodians or search terms at all.

2 **MR. YEUNG:** So Minnesota has taken the position that  
3 the agencies for whom Meta has subpoenaed, that they're not  
4 subject to the search term/custodian process.

5 **THE COURT:** That you have subpoenaed?

6 **MR. YEUNG:** We subpoenaed -- the agencies we  
7 subpoenaed back before Your Honor issued the September 6th  
8 order to move discovery along, those agencies are -- the  
9 Minnesota -- my understanding is that Minnesota is taking the  
10 position that search terms and custodians do not need to be  
11 provided for those subpoenaed agencies.

12 **THE COURT:** I don't understand that. Okay.

13 **MR. YEUNG:** Well, that's --

14 **MS. MICKO:** Caitlin Micko on behalf of the State of  
15 Minnesota.

16 It's a little bit more complicated than that, Your Honor.  
17 The Department of Human Services is one of the agencies that  
18 was issued a Rule 45 subpoena. They negotiated the scope of  
19 the Rule 45 subpoena back in August; and in doing so, explained  
20 to Meta that it was too burdensome to run search terms and  
21 custodians. They memorialized that negotiation in an e-mail  
22 that went unanswered by Meta, and they started to prepare their  
23 production pursuant to the Rule 45 subpoena when Meta put it in  
24 abeyance.

25 As soon as Judge Gonzalez Rogers ordered that they



1 restart, that's what they did, and they are set to complete  
2 their production this week pursuant to their original  
3 negotiations.

4 **THE COURT:** Okay.

5 **MS. MICKO:** The Minnesota Department of Health has  
6 also completed their production, produced over 13,000  
7 documents, 90,000 pages. And so they consider their  
8 obligations complete.

9 And the Department of Education has served objections, has  
10 asked Meta to engage in meet and conferrals, and their  
11 production is forthcoming.

12 And I will also note that at our most recent meet and  
13 confer, Meta asked these agencies to explain the process they  
14 went through to conduct the search, and the agencies have  
15 agreed to do that. So we're -- we are continuing to confer  
16 about that process.

17 **THE COURT:** Okay.

18 **MS. MICKO:** So I would submit to the Court Minnesota  
19 agencies are fully engaged in the process. We are not a  
20 holdout state.

21 **THE COURT:** Okay. Let's move on.

22 **MR. YEUNG:** So then there's New York. New York has  
23 given me search terms and custodians for one agency. I've had  
24 discussions with both the New York AG and counsel for the  
25 New York Governor's Office's Executive Chamber, which I think I

1 mentioned last time we were here.

2 Since then, the other agencies -- the rest of the agencies  
3 that are -- all the agencies that are represented by the  
4 Executive Chamber's counsel, which totals eight agencies, they  
5 have provided me with four search terms that they propose  
6 running on an unidentified set of custodians for three agencies  
7 without any commitment to do anything else with respect to the  
8 remainder of their -- with the balance.

9 **THE COURT:** Okay. So, again, that doesn't really  
10 answer my question. Are there any New York agencies that are  
11 refusing to even engage in discussions about custodians or  
12 search terms?

13 **MR. YEUNG:** Well, I would at least put the ones that  
14 haven't even put search terms in writing in that bucket even  
15 though I haven't been given a flat no. For the ones that  
16 were -- have given me search terms, I don't know who they're  
17 running them against and they haven't really engaged.

18 **THE COURT:** If they've given -- if they've given you  
19 search terms and that's part of the negotiation, you've got  
20 until December whatever to try to work that out. So that's not  
21 what I'm asking about.

22 What are the agencies that have not given you anything?

23 **MR. YEUNG:** Let me consult. It might be more  
24 efficient if I give it to you after this in writing, if  
25 that's --

1           **THE COURT:** No. I need the list now because you're  
2 meeting with Judge Gonzalez Rogers tomorrow.

3           **MR. YEUNG:** Okay.

4           **THE COURT:** If you can't have -- if you don't have a  
5 list of anybody else who's not complying, that's fine.

6           **MR. YEUNG:** Well, I know -- but these are the agencies  
7 that are not complying. I just don't have their names at my  
8 fingertips at this point in time. I apologize.

9           **THE COURT:** If you need time to look in your computer,  
10 then you can come back, and we'll move on to another issue.

11           **MR. YEUNG:** Okay. But there are other states as well.

12           **THE COURT:** You understand --

13           **MR. YEUNG:** I understand.

14           **THE COURT:** -- if it's people who have -- you've made  
15 points about people who you believe are not substantively or  
16 substantially complying. That's not what I'm asking. Okay?  
17 You've got time to finish meet and conferring with them. All  
18 right?

19           I'm asking people, such as those eight California  
20 agencies, that are simply refusing to do anything. Do you  
21 understand the difference of what I'm asking for?

22           **MR. YEUNG:** Yes, I understand. I understand the  
23 difference.

24           **THE COURT:** Okay.

25           **MR. YEUNG:** Just as a clarification, I mean, with

1 Pennsylvania, they want us to reach out to each of the  
2 individual agency counsel themselves and have this discussion  
3 with them. We tried to have a call where the AG brought in the  
4 agencies and have this discussion. They didn't want to do  
5 that.

6 **THE COURT:** That's in defiance of my order. My order  
7 says, and I think Judge Gonzalez Rogers also put in an order,  
8 the AGs are supposed to help coordinate all this.

9 **MR. YEUNG:** We agree with that, and so that's why we  
10 haven't -- I haven't gotten a flat no from some of the  
11 Pennsylvania agencies, is because the AGs are not -- but, you  
12 know -- so it's a slightly different issue, but I agree with  
13 that that's not in -- that that's not in compliance with the  
14 Court orders.

15 **THE COURT:** Okay. Why don't you figure out who's left  
16 to list, and then we'll move on to another issue.

17 **MR. YEUNG:** Okay.

18 **THE COURT:** Okay. Should we take a break?

19 Do you need a break? Can we keep going?

20 Okay, we'll keep going.

21 Who's doing Letter Brief 1305? That's the YouTube.

22 **MS. SIEGEL:** Good afternoon. Audrey Siegel on behalf  
23 of the PI/SD plaintiffs.

24 **THE COURT:** Good afternoon.

25 **MR. DONOHUE:** Good afternoon. Matthew Donohue on

1     behalf of the YouTube defendants.

2           **THE COURT:**   Good afternoon.

3           All right.   So I've read the letter brief.   On RFP 62,  
4     tell me if I'm misunderstanding, but you wanted documents  
5     sufficient to show crisis management organization and policies  
6     for responding to investigation of the lawsuits regarding  
7     minors, including methods of communication thereto.

8           So YouTube, at least in the brief, said that they produced  
9     documents sufficient to show the teams and the reporting lines  
10    and gave a 30(b)(6) and a rog on this about the teams who do  
11    this.   So what's missing?   I don't understand what they didn't  
12    provide yet.

13          **MS. SIEGEL:**   Sure.   So, first of all, 30(b)(6)  
14    testimony is not a substitute for documents.   Right?   So we  
15    still need documents to be able to use, for example, against  
16    other deponents.

17          But going beyond that, the 30(b)(6) deposition testimony  
18    related only to the organizational structures of some of the  
19    departments.   It did not include any testimony regarding the  
20    policies related to the communications.

21          **THE COURT:**   Let me stop you there.

22          Have you produced the policies?

23          **MR. DONOHUE:**   It is my understanding, and I just want  
24    to be clear because "policies" is kind of a vague term, so this  
25    question as written kind of straddles into a lot of

1 specifically, I think, legal advice to the extent it's talking  
2 about responding to government investigations and lawsuits.

3 **THE COURT:** Okay.

4 **MR. DONOHUE:** If we bracket off in-house legal  
5 policies, my understanding is there are no such policies.

6 **THE COURT:** There's your answer.

7 **MS. SIEGEL:** That's the first time that we've heard  
8 anything like that, and I would also note that that seems to  
9 not be entirely accurate.

10 You know, YouTube, there was an article just yesterday  
11 from the *New York Times* titled "How Google spent 15 years  
12 creating a culture of concealment," where they talk about all  
13 of the policies that do exist extremely limiting communications  
14 and designed to invoke attorney-client privilege where it's not  
15 there by cc'ing attorneys who will, and YouTube are well aware  
16 of this.

17 And so in the first instance, if there is, in fact, no  
18 policies related to how to respond to crises or crises or media  
19 inquiries or investigations, they can state as much in an  
20 amended response. We've never heard anything like that before.

21 **THE COURT:** Let me stop you there. If you're saying  
22 that there are no nonprivileged policies for crisis management  
23 or responding to investigations, lawsuits regarding safety of  
24 minors, then you are ordered to serve a supplemental response  
25 to the document request saying such.

1           **MR. DONOHUE:** I think we can meet and confer. Again,  
2 I just want to be clear, that, like, we would want to interpret  
3 this in a way that is not referring to in-house legal's  
4 policies for handling -- like, the request as written calls for  
5 policies to respond to investigations, lawsuits, which a lot of  
6 that seems to refer directly to what would just be the function  
7 of an in-house legal department.

8           **THE COURT:** Sure. Like I said --

9           **MR. DONOHUE:** We're happy to -- we're happy to meet  
10 and confer on an amended response.

11           **THE COURT:** You can provide a response. No, I'm  
12 ordering you to provide a supplemental response to the document  
13 request that says, if this is a fact -- right? -- that says  
14 there are no nonprivileged policies responsive to this request.

15           **MS. SIEGEL:** Can I raise -- sorry. I didn't mean to  
16 interrupt.

17           **THE COURT:** I mean, if that's not true, then you need  
18 to produce the nonprivileged policies.

19           **MR. DONOHUE:** Understood.

20           **THE COURT:** Okay.

21           **MR. DONOHUE:** And, again, just to be clear, the  
22 request calls for documents concerning, but you're -- the  
23 concerning goes much farther. I'm talking about the policies  
24 themselves. That's my understanding.

25           **THE COURT:** Let's get the policies themselves first,



1 and then see if there's anything beyond that that they want to  
2 take further discovery on.

3 **MR. DONOHUE:** Absolutely.

4 **THE COURT:** All right.

5 All right. The other thing, again, the document request  
6 asks for methods of communications -- identifying methods of  
7 communications between the people or, I guess, the teams that  
8 do this stuff. The briefing didn't talk about that.

9 So have any documents been produced on methods of  
10 communication between the people who work on these things?

11 **MR. DONOHUE:** I mean, honestly, Your Honor, I'm not  
12 entirely sure what that means. There has been, again, 30(b)(6)  
13 depositions on how Google employees communicate with each  
14 other; you know, the use of e-mail, chat, things like that. So  
15 that is certainly something that plaintiffs have had an  
16 opportunity to investigate into.

17 **THE COURT:** Was there anything more that you wanted?

18 **MS. SIEGEL:** Yeah. Well, first of all, going back to  
19 the order about policies, I would like to note two things.  
20 First of all, if they're going to say that there are no  
21 documents that exist, that's one thing. If they're going to  
22 say that there are no nonprivilege documents that exist, then I  
23 believe those documents that are being withheld should be  
24 logged on a privilege log. I think that's particularly  
25 critical here given the article I just cited and the habit of

1 false claims of privilege.

2 **THE COURT:** I didn't say it because I thought that  
3 goes without saying.

4 If you're saying that there are only privileged policies  
5 or not even -- if there are privileged policies that are  
6 otherwise responsive to the RFP -- again, I assume you've got a  
7 schedule or discussions on when to exchange privilege logs. If  
8 you're withholding anything based on privilege with regard to  
9 this RFP, you need to put it on a log.

10 **MR. DONOHUE:** Well, I think it's -- Your Honor, it's  
11 not just a matter of privilege. Part of it is the matter of  
12 the request as written, it becomes very difficult to define  
13 what one would call within a legal department a policy for  
14 responding to lawsuits related to the safety of children,  
15 teens, and youth who use your platform.

16 **THE COURT:** Well, this is where the burden of proof  
17 falls on you. Right? If you are the party asserting  
18 privilege, the burden of proof is on you to assert the  
19 privilege; and failure to assert it timely, which means putting  
20 it on the log, waives the privilege so --

21 **MR. DONOHUE:** Your Honor, I apologize.

22 **THE COURT:** -- or potentially waives the privilege.  
23 So if you've got -- if you're in doubt as to what to log or  
24 whether to log, I think you've got to make that judgment  
25 yourself; right?

1           **MR. DONOHUE:** Understood.

2           **THE COURT:** All right. And, again, I don't know if  
3 you have an agreement not to bother logging things that have to  
4 do directly with this lawsuit. For example, often people say  
5 you don't have to log, you know, documents concerning the  
6 present lawsuit, so that may relieve any burden. I don't know  
7 if such an agreement exists.

8           **MS. SIEGEL:** No, it does not. I just thought it was  
9 an important point to clarify just in terms of how it's  
10 phrased.

11          **THE COURT:** I think I've clarified it.

12          **MS. SIEGEL:** Thank you.

13          **THE COURT:** What about -- so do you need anything more  
14 on methods of communications? If they communicate by e-mail  
15 and internal text or whatever they're using --

16          **MS. SIEGEL:** I'd like to go back, actually, also to  
17 the issue about not having any nonprivileged documents because  
18 counsel has focused on the portion of the request that relates  
19 to lawsuits or government inquiries, but there is also the part  
20 of the request that relates to crisis management and media  
21 inquiries.

22          And so plaintiffs complain -- there's no question that  
23 YouTube has been the subject of media regarding the safety of  
24 children and its addictive features since at least, I think,  
25 2012, and what -- so how they relate to inquiries that would be

1 related to those media -- to those news articles would be  
2 relevant, but as would YouTube's tracking and management of  
3 crises as they are evolving or coming into effect. So, for  
4 example, even if not asked a media inquiry, if they are  
5 tracking other crises and news articles as they emerge and  
6 their response to them as well.

7 So there's not just the question -- even with regard to  
8 the -- and even with regard to the investigations and lawsuits,  
9 there may be one part of the policy that relates to how the  
10 legal team is going to respond and there may be another part of  
11 a crisis management policy that concerns how Google is going to  
12 investigate the claims and issues or safety issues that are  
13 brought up in order to remedy them or in order to change its  
14 policies regarding in response to these types of issues.

15 And then if you need a moment, that's fine, but otherwise  
16 I'm happy to address the issue of communications.

17 **THE COURT:** Okay. So are there -- there must be  
18 nonprivileged documents responsive to this request regarding  
19 media inquiries.

20 **MR. DONOHUE:** Your Honor, my understanding, and we  
21 will serve an amended response according to Your Honor's  
22 instructions, is that there is not a crisis management or  
23 crisis communication policy related to media inquiries related  
24 to the safety of children, teen, and youth who use our  
25 platform.

1           **THE COURT:** Okay. If that's what they're saying,  
2 that's what they're saying.

3           **MS. SIEGEL:** But what they're doing is they're sort of  
4 segmenting one thing at a time.

5           So the first is media inquiries. It is doubtful that a  
6 company like YouTube has no policy for how to respond to media  
7 inquiries just to begin with. If, in fact, they don't have any  
8 nonprivilege documents, they can go ahead and say that.

9           But they're separating out, again, here, you know,  
10 investigations or crisis management, so their policies for  
11 responding to that. And we already know from their 30(b)(6)  
12 deposition that they have a group called Roomba, which is an  
13 *ad hoc* group that responds to emerging crises.

14           **THE COURT:** Let me stop you there. The document  
15 requests, at least as relayed to me, says documents concerning  
16 any crisis management or crisis communication structure,  
17 organization, or policy developed by you, YouTube, to respond  
18 to investigations, lawsuits, media inquiries, or government  
19 inquiries.

20           So I don't -- I mean, the document request on its face  
21 links the two, it links crisis management to media inquiries,  
22 unless you've got a separate request that asks for, you know,  
23 media inquiries in general and how you handle them, that's --  
24 because that's -- your argument seems to be focused on trying  
25 to find those documents, and that's not this request.

1           **MS. SIEGEL:** So I do think that -- I mean, I still  
2 think that it's unlikely -- it also includes investigations,  
3 and I think investigations would be broad enough to cover  
4 crises as they're emerging.

5           **THE COURT:** Sure. No, but my point is, it looks like  
6 this request as phrased is -- it does link crisis management  
7 and crisis communication to investigations, lawsuits, media  
8 inquiries, and all that.

9           So, again, if they -- if they can truthfully say under  
10 Rule 11, you know, in an amended supplemental response that  
11 there are no such documents other than privilege documents  
12 which we will log, then that's your answer.

13           But if there are other ways that you think you can get at  
14 media inquiries, I mean, you can always serve another document  
15 request, I suppose, or ask for a 30(b)(6) on this group that  
16 you've talked about.

17           All right. I mean, you've got other tools to get at  
18 that -- other than this RFP because it sounds like what you're  
19 really going after is not exactly what this RFP is going after.

20           **MS. SIEGEL:** I think we are really going after what  
21 this RFP is after. It may be accurate that we are also  
22 interested in other information, but I do think that what is  
23 here is needed, responsive, and should be produced.

24           **THE COURT:** Okay. So, again, if there exist  
25 nonprivileged documents responsive to this RFP, they need to be

1 produced; or if they've already been produced, you need to tell  
2 them they have them been and, you know, point them in the right  
3 direction.

4 But if there are no nonprivileged docs -- too many  
5 negatives. If only privilege documents exist that would be  
6 otherwise responsive to this request, then you need to say that  
7 clearly in a supplemental response. And then you can take  
8 further discovery to get around that or try to figure out --  
9 you know, look at the log once they see it and see whether  
10 they're actually justified in taking the privilege --

11 **MS. SIEGEL:** Sure. But I --

12 **THE COURT:** -- position.

13 **MS. SIEGEL:** Sorry.

14 If I could just make one last point.

15 **THE COURT:** Yeah.

16 **MS. SIEGEL:** It may be that YouTube's tracking of  
17 media documents where they're not asked for comment, so it's  
18 not a media inquiry but it's another media statement, I see  
19 where you're coming from to say that that's outside the scope;  
20 but to the extent that, you know, Roomba is designed to, in  
21 part, deal with crises that are -- that come about as a result  
22 of media inquiries, that would still be relevant and  
23 responsive.

24 **THE COURT:** What's the name of the group?

25 **MS. SIEGEL:** Roomba, the vacuum cleaner.



1           **THE COURT:** That's what I thought you were saying. I  
2 just wanted to make sure.

3           Okay. So --

4           **MR. DONOHUE:** Your Honor, if I can clarify.

5           My understanding is that is not -- that is not a group.  
6 That is just an informal term that is used for, as she said  
7 earlier, an *ad hoc* group that might exist for a particular  
8 purpose.

9           **MS. SIEGEL:** Right. And so they must have a policy  
10 related to that *ad hoc* group even if it's not a standing group.

11           **THE COURT:** Do they? Is there a written policy with  
12 regard to this *ad hoc* group?

13           **MR. DONOHUE:** My understanding is, no, because it is  
14 not -- this is not referred to a standing organization. It is  
15 a -- it is a -- as the nature of the term might suggest, it is  
16 sort of a generic, relatively informal term for a type of *ad* --  
17 a type of *ad hoc* group.

18           **THE COURT:** Okay. So, again, if you -- if we agree  
19 that this Roomba -- documents concerning this Roomba group  
20 would be responsive to this RFP but would be privileged, then  
21 that's your answer; right? I mean, I understand you don't --

22           **MS. SIEGEL:** This is the first time we're hearing that  
23 these policies don't exist. I don't even think that that was  
24 in the --

25           **THE COURT:** I don't like to do meet and confers in

1 front of me but that's fine, we can do that.

2 Okay. So, again, I think I've resolved it; right? So if  
3 there exists nonprivilege documents responsive to this, you do  
4 need to produce them; but it sounds like there are none, in  
5 which case you do need to log them and give a supplemental  
6 response.

7 **MR. DONOHUE:** Your Honor, if I can just clarify two  
8 things.

9 Number one, when you say "responsive" -- so I think we've  
10 been talking about the policies, specific structural documents,  
11 things like that. Then there's a whole other bag of worms that  
12 gets pulled in when you say "concerning." And, again, I'm  
13 thinking here specifically about to the extent we're dragging  
14 in legal and there's legal communications that have to be  
15 logged.

16 Is your -- are you talking just about the actual policies  
17 and the documents or --

18 **THE COURT:** Or documents that discuss the policies.

19 **MR. DONOHUE:** Okay.

20 **THE COURT:** Not just vaguely relate to them in some  
21 extended existential way --

22 **MR. DONOHUE:** Understood.

23 **THE COURT:** -- but actually refer to them, discuss  
24 them explicitly, or are the policies themselves.

25 **MR. DONOHUE:** And then just to clarify, on the

1 privilege log, we would do that in the same way we've been  
2 logging -- we've been doing our privilege logs generally?

3 **THE COURT:** I assume, yes, you should follow --

4 **MR. DONOHUE:** Okay.

5 **THE COURT:** -- the same agreement you have on that.

6 Okay. RFP 69 you wanted --

7 **MS. SIEGEL:** Wait. Sorry.

8 You did ask about the communications issue --

9 **THE COURT:** Yeah. Yeah.

10 **MS. SIEGEL:** -- and why communications policies are  
11 necessary or what we're getting at there.

12 And the response to that is that YouTube does have a  
13 history of specifically instructing employees on how to  
14 communicate to avoid discovery. This was also a part of the  
15 *New York Times* article I referenced yesterday.

16 But while YouTube states that, well, there are, in fact --  
17 there has already been 30(b)(6) testimony regarding how  
18 employees are intended to communicate, that was how  
19 employees -- what systems employees are instructed to use for  
20 communications, that does not necessarily relate to not using  
21 particular language in regard to crises as they are emerging.  
22 It does not relate to YouTube's use of particular other forms  
23 of communications in terms of a crisis.

24 For example, the article lists a situation in which one  
25 YouTube C suite member asked Susan Wojcicki if she had a fax

1 machine because he didn't want to send the communication via  
2 e-mail.

3 And so I think that, you know, when we're thinking about  
4 what the communications are generally, it's probably true that,  
5 you know, general information about communications and what  
6 systems and tools are available might be sufficient, but that  
7 does not appear to be the case here and that was not testified  
8 to at the 30(b)(6) deposition.

9 **THE COURT:** So, like I said, the briefing didn't  
10 really touch on this piece of it on either side, so -- and  
11 you're referencing an article that just came out. So I'm going  
12 to order you to meet and confer on this subpiece of it on the  
13 methods of communication issue and see if you can reach  
14 agreement on it because it sounds like it's actually not ripe.

15 **MR. DONOHUE:** Understood.

16 **THE COURT:** Okay.

17 All right. Request for Production 69 is going after  
18 documents for compensation for working on safety for youth,  
19 which apparently the parties agree would not include  
20 lower-level employees.

21 YouTube's position is you've produced the company's  
22 generic or general compensation policy, which are the policies  
23 responsive to this request, and that no specific policies  
24 regarding youth safety exist.

25 So, again, is this a situation where you need that in a

1 supplemental response or is the briefing enough?

2 **MS. SIEGEL:** So two things. The first is that that is  
3 the -- the briefing was, in fact, the first time that we heard  
4 about it. We did, perhaps belatedly but prior to -- just  
5 before we came in, we did try to discuss this with opposing  
6 counsel.

7 But the other issue to note is that the general -- like,  
8 how -- documents concerning how the general policies are  
9 actually applied to youth safety I think would be relevant and  
10 responsive and that there's no basis for withholding them, and  
11 that information is absent from YouTube's joint letter brief.

12 So, for example, if there are documents reflecting or  
13 relating to the compensation policy where they're talking  
14 about, "Oh, we can't get any good hires for our safety teams  
15 because of YouTube's compensation policy" -- right? --  
16 something like that would be responsive to the extent that --  
17 and here, to the -- you know, again because YouTube is not  
18 producing all documents that hit on search terms that are  
19 reviewed and only responding with those that are within its  
20 scope of agreed production, the mere fact that there aren't any  
21 policies wouldn't necessarily mean that there are no documents  
22 relating to how those policies are actually applied in the  
23 sense.

24 But that said, if YouTube does state that there are no  
25 policies specific to child safety and that there are no

1 policies -- no documents reflecting how they're applied to  
2 safety in an amended response, of course that would be  
3 sufficient for us.

4 **MR. DONOHUE:** Yeah. So I agree there was a  
5 conversation before about what exists and what doesn't, and  
6 we're trying to confirm exactly some of the details of that.

7 But my understanding is there are -- there are no such  
8 policies beyond the generic policies we've produced. The only  
9 thing that we're aware of that would be, arguably, something  
10 reflecting how those policies are applied would be individual  
11 compensation information.

12 **THE COURT:** Okay.

13 **MR. DONOHUE:** And we obviously have a separate whole  
14 agreement and discussion around that.

15 **THE COURT:** Okay. So let me just -- other than  
16 whatever's in people's personnel and compensation files, are  
17 there -- are there documents that discuss the process or  
18 criteria by which the policies are applied to those people  
19 working on youth safety or just they don't exist?

20 **MR. DONOHUE:** My understanding is they do not exist.

21 **THE COURT:** Okay. So you need to put that -- what I'm  
22 hearing is you need to put that in a supplemental response, and  
23 that may solve this current dispute.

24 **MR. DONOHUE:** I think it may, yeah.

25 **MS. SIEGEL:** Yep.

1           **THE COURT:** Okay. And then RFP 71, 72, 76, and 79.

2           So this goes to documents -- or, actually, policies on  
3 user complaints in different forms.

4           And I understand from YouTube is they've produced the  
5 current policies, and it sounds like most of these are up on  
6 the website somewhere or the terms of service, or something  
7 like that.

8           **MR. DONOHUE:** There's a number of different things  
9 referred to as policies, and there's both internal and external  
10 policies; but in either case, what we are referring to is a  
11 website. It's either an internal website or an external  
12 website.

13          **THE COURT:** All right. And then what I understand is  
14 that when we start talking about if there were prior versions  
15 found, you've also produced those?

16          **MS. SIEGEL:** No. Sorry.

17          **THE COURT:** If there were complete prior versions  
18 found, you've produced them?

19          **MR. DONOHUE:** If there were complete prior versions  
20 that we encountered as part of our custodial production, those  
21 were produced.

22          **THE COURT:** Okay. And what I'm hearing is the current  
23 dispute is whether you need to go back and look in noncustodial  
24 sources for the prior versions? Is that what you're looking  
25 for?



1           **MS. SIEGEL:** That -- I think I would say that's  
2 accurate.

3           **MR. DONOHUE:** I think the issue is a little different  
4 than that, which is that a prior version in the concept of  
5 like, you know, here's a -- here is a complete document that is  
6 the policy as it existed on such date does not exist.

7           Because these are -- these are websites, they're not  
8 maintained in the same way as you might have a document where,  
9 you know, you send out the new memo when there's a new version.  
10 People go and they edit it, and there's not a saved version of  
11 the former policy, quote/unquote, that existed on such and such  
12 date.

13           **THE COURT:** Okay.

14           **MR. DONOHUE:** So what we have done is, we have  
15 produced all the policies we have that exist. And then my  
16 understanding is there's a system where somebody can at a very  
17 manual sort of edit-by-edit, policy-by-policy basis go through  
18 and pull out, like, a little snippet for a particular date and  
19 collect those. It has to be done -- because the way the system  
20 works, it has to be done on an individual per policy, like, an  
21 individual -- a human pulling each one individually for each  
22 change and then produce that. And we have done that for a  
23 number of the key policies that are at issue.

24           We have also offered that if there are particular other  
25 policies that plaintiffs would like us to do that for, that we

1 would be willing to discuss that. Plaintiffs have not engaged  
2 in that. Instead, want us to produce every -- basically do  
3 that process for every version change that we can find for all  
4 of the policies we have produced, which I think is -- it's in  
5 excess of 100 internal policies, maybe approaching 200.

6 **MS. SIEGEL:** If I could respond to that.

7 I think there's a little bit -- first, a piece of  
8 clarification on what counsel has said, which is that they  
9 produced the key policies in this way of going back and getting  
10 them.

11 But I don't think, or at least I don't understand, that  
12 the key policies that he's referring to are these  
13 complaint-oriented policies. I think there are other types of  
14 policies.

15 And the second thing I would say is, far from insisting  
16 that they produce all versions in every policy, we have sought  
17 to meet and confer with them regarding these requests and  
18 historical versions of these requests for months.

19 In regard to the specific -- when they came back and said  
20 that this was this process after months of asking them to  
21 identify what the process was, we asked for additional  
22 information so that we could understand what the burden was and  
23 if there was a viable way to sort of limit the policies.

24 But it's not as though YouTube is saying, "Well, we know  
25 that the policies were changed on XYZ date or that there were

1 significant changes in these policies on these particular  
2 dates." They're essentially asking us to just shoot in the  
3 dark on which particular versions of the policies that we might  
4 need.

5 And to the extent that they're claiming burden, it's not  
6 enough to just say, "No, actually, that would be really hard."  
7 It sounds like they know how to do this. They're capable of  
8 doing this. They've done it for other policies and procedures,  
9 and so they should have also an estimate of time, an estimate  
10 of man hours, an estimate of cost of what it is to produce  
11 these policies.

12 They haven't provided that. They haven't provided  
13 information about where even -- what even repository these  
14 documents are stored in. And so it's not that plaintiffs have  
15 taken the position that no matter what burden you say, you have  
16 to produce literally everything; it's that we've asked them for  
17 information about the burden so to meaningfully meet and  
18 confer.

19 **THE COURT:** So tell me if I'm wrong. I think YouTube  
20 in the briefing identified what they think are the key  
21 policies, which is child safety policy, harassment and bullying  
22 policy, harmful or dangerous self-harm and eating disorder  
23 policy, age-restricted content policy for the relevant time  
24 period. Is that -- oh, policy for reporting inappropriate  
25 videos, channels, other content.

1 Did I miss one? One, two, three, four... There's six as  
2 I count them. Six; right? Let me go through it again.

3 Child safety policy; harassment and bullying policies;  
4 harmful or dangerous content policy; policy for reporting  
5 inappropriate videos, channels, or other content; suicide,  
6 self-harm, and eating disorders policy; and age-restricted  
7 content policy.

8 Are those what you're referring to as the key policies?

9 **MR. DONOHUE:** Yes, Your Honor.

10 **THE COURT:** But, as I heard you say, you're really  
11 only interested in user complaint policies -- right? -- which  
12 would be the policy of reporting inappropriate videos,  
13 channels, and other content?

14 **MS. SIEGEL:** We have certainly asked about policies  
15 that relate to their policies on that type of content.  
16 However, what they're not saying is that these are their  
17 policies for investigating, responding to, and analyzing the  
18 complaints, which is what is at issue in these questions.  
19 Right?

20 Yes, the complaint reporting process is a part of it, but  
21 it's not really the only part of it. We're seeking policies  
22 related to facilitating, documenting, reviewing, analyzing,  
23 discussing, and responding to and addressing user complaints.

24 **MR. DONOHUE:** Your Honor, if I may.

25 The -- if the issue is the identity of the policies that

1 are most important, we have produced the current versions.  
2 Plaintiffs have those in their possession. They can look at  
3 those and say what they think they would like to come back to  
4 us and say, "Can we go back on that?" That's sort of what we  
5 offered to do.

6 So I don't understand the issue about the dispute about  
7 which policies are in dispute.

8 **THE COURT:** What is it about that?

9 **MS. SIEGEL:** They have not a single time phrased it  
10 anything like that.

11 And I would also note that they have a very large document  
12 production. And to say, "You should be able to go find all of  
13 the policies to determine which policies are the best ones to  
14 come back to us and let us know," is different than them just  
15 saying, "These are the policies." Right?

16 And then number two is that they're not saying that if we  
17 requested the specific policies, they would produce all of  
18 those historical versions of that. They're saying that we  
19 should also from the current policies be able to pick a subset  
20 of those policies -- a subset of those changes or versions, and  
21 it's just not --

22 **THE COURT:** So let's just go one step at the time. I  
23 mean, how hard is it to -- I mean, I assume the word  
24 "policies" -- how hard is it to find these policies in the  
25 document production?

1           **MS. SIEGEL:** I think that a search for the term  
2 "policies" would be quite large. I mean, we have tried.

3           **THE COURT:** Does YouTube know where by Bates number  
4 each of these policies are in production?

5           **MR. DONOHUE:** I don't know offhand how it's been  
6 logged.

7           **THE COURT:** Okay. So if what YouTube is saying, "We  
8 produced all the current policies and you need to go back and  
9 find the ones that you think are key" --

10           **MR. DONOHUE:** And, Your Honor, respectfully, if we  
11 produce more, that's not going to make it any easier for  
12 plaintiffs to sift through and find what they want. Plaintiffs  
13 ultimately will have to do that.

14           **THE COURT:** I mean, the phrasing that you've used,  
15 because it's not capitalized, are these the titles of each  
16 policy or are these just a generic -- or not generic -- but are  
17 these just a description of the policy?

18           **MR. DONOHUE:** It think that's a description of the  
19 policy.

20           **THE COURT:** Well, you know, Plaintiffs, if you're the  
21 one who want to find out more information about these, I mean,  
22 you're going to have to use keyword searches to try to find the  
23 policies. Right?

24           But I do expect, again, in the spirit of being transparent  
25 and collaborative in the meet-and-confer process, if YouTube

1 knows where the policies are, because you know you produced  
2 them with this production set on this date -- right? -- then  
3 you should tell the other side. Okay?

4 **MR. DONOHUE:** Of course. We'll look into that.

5 **THE COURT:** And to counsel's point, the categories of  
6 policies here don't go to policies, if any exist, on  
7 investigating or responding to user complaints. Is it because  
8 they don't exist or you've produced them?

9 **MR. DONOHUE:** I'm not actually entirely sure the  
10 answer to that question. I think the way we are defining  
11 things may encompass responding to user complaints.

12 **THE COURT:** Okay.

13 **MR. DONOHUE:** A content policy is related to what  
14 happens when that content is reported, and that is a user  
15 complaint in a sense.

16 **THE COURT:** Okay. And I'm sure the way each side is  
17 using adjectives to describe a policy, that you're not going to  
18 use the exact same terms. So you need to -- I think this is  
19 one on investigating reporting complaints, you still need to  
20 meet and confer because, yeah, I don't think you're done on  
21 that one.

22 But in terms of the historical policies, I do think both  
23 sides need to do some work to try to find the policies and try  
24 to figure out which of those you really do need the historical  
25 versions; right? And if it's a subset, if it's only one or



1 two, I don't mean -- I don't think you've got much of a burden  
2 argument because it's only one or two.

3 **MR. DONOHUE:** Yeah, of course. We have been happy to  
4 meet and confer on that basis.

5 **THE COURT:** Okay.

6 All right. I think -- does that cover all of those  
7 requests?

8 **MS. SIEGEL:** It does, Your Honor. Thank you.

9 **THE COURT:** Okay. So just to save the Court a little  
10 bit of time, I'm going to ask you to jointly submit a proposed  
11 order on resolving this one just so I make sure the  
12 phraseology -- that we're all on the same wavelength on the  
13 phraseology for that, Your Honor.

14 **MR. DONOHUE:** Of course, Your Honor. Thank you.

15 **MS. SIEGEL:** Thank you.

16 **THE COURT:** Five-minute break.

17 (Recess taken at 2:28 p.m.)

18 (Proceedings resumed at 2:36 p.m.)

19 **THE CLERK:** Now recalling 22-3047.

20 Counsel, as a reminder, please approach and state your  
21 appearance every time you speak.

22 **THE COURT:** Okay. Who's doing Docket 1318, Meta  
23 compensation docs?

24 **MS. SCULLION:** Good afternoon, Your Honor. Jennifer  
25 Scullion for the PI/SD plaintiffs.

1           **THE COURT:** Good afternoon.

2           **MS. SAFFARINI:** Good afternoon, Your Honor. Serena  
3 Saffarini for the Meta defendants.

4           **THE COURT:** Good afternoon.

5           Okay. What is the compelling need for the exact dollar  
6 figure of these 11 people's compensation, bonus, and stock  
7 options reports?

8           **MS. SCULLION:** Sure. And thank you, Your Honor.

9           The compelling need is that, as Your Honor gave us  
10 guidance when we looked at this issue with respect to TikTok,  
11 we've targeted these deponents for whom we're seeking this  
12 personnel information. We engaged and came to agreement with  
13 Meta on 11 out of 39. We did pretty good on the targeting  
14 there. So we're getting the evaluations and the reviews and we  
15 have the policies.

16           So we're missing sort of that third leg of: Okay, here's  
17 the policies of how bonuses and compensation are determined.  
18 Here's part of the data that goes into that for that  
19 individual, their evaluations -- you know, their reviews. We  
20 can see what was being discussed, what was the outcome.

21           So for those individuals, we're trying to get that  
22 complete picture of -- again, what we're looking for really is  
23 an understanding of Meta's conduct. What did Meta do to  
24 incentivize or disincentivize certain performance from these  
25 individuals? So it's really just to try and get that complete

1 picture for the select group of individuals.

2 **THE COURT:** Okay. How would the dollar figures alone  
3 give you the linkage between what you're calling incentivizing  
4 them versus the result of that incentive?

5 **MS. SCULLION:** Well, the dollar figures, because we  
6 can tie it to the policy, will tell us whether Meta was valuing  
7 them as someone who exceeded expectations or there's sort of  
8 those categories that Meta has and a lot of employers have.

9 And we can look and see how does that compare to, well,  
10 what was the review where they determined from that review to  
11 be someone who had, in fact, exceeded expectations. And if  
12 that review, for example, from our perspective, is really  
13 highlighting that that individual contributed greatly to one of  
14 Meta's key goals, which was to expand user engagement -- and we  
15 know -- expanding user engagement we know is something Meta did  
16 look at in terms of its bonus policies generally. So it's not  
17 that we are guessing at this.

18 So if we can see from the review that person had comments  
19 that that year they contributed to expanding user engagement,  
20 you know, in a meaningful way and then we can see, well, what  
21 was the outcome, you know, in terms of their bonus, were they  
22 deemed someone who had exceeded expectations or I think there's  
23 even like a way beyond that category, which I have here.

24 **THE COURT:** You have the reviews that say exceeded --  
25 you don't have the dollar figure, but you've got the review

1     itself that says they exceeded or didn't explanations.

2           **MS. SCULLION:**   I don't know that we actually have  
3     the -- that the reviews themselves say that they exceeded  
4     expectations.   We don't have --

5           **THE COURT:**   Okay.

6           **MS. SCULLION:**   -- you know, all of those yet for these  
7     individuals.   But, you know, so we do want to see what the  
8     compensation, you know, looked like, what the outcome was.

9           We also -- the other part of it is we want to, frankly,  
10    test to make sure that what Meta is saying the policy is is, in  
11    fact, how it played out with individuals.   So there's sort of  
12    that checking, you know, as well.   So there's those two.

13          **THE COURT:**   Okay.   Do you concede or you agree that  
14    the information sought here is governed by the California  
15    Constitution right to privacy or do you dispute that?

16          **MS. SCULLION:**   So, Your Honor, we -- we agree that  
17    concept of compensation is -- I think Your Honor correctly drew  
18    a distinction last time between stuff that's coming from their  
19    personnel file as opposed to from the accounting files.

20          We took that to heart, and that's why we went back with  
21    Meta and the other defendants and said, "Well, we want the  
22    information coming out of your accounting files."   And YouTube,  
23    for example, we were able to reach an agreement on a number of  
24    the deponents.   We're still discussing others.

25          So in that respect, it's not clear to me that it really

1 does fall within California's policy; but even so and if it  
2 did, I think Your Honor last time correctly drew -- said there  
3 was a balance to be struck here, and that that balance could be  
4 struck by targeting, you know, a subset of individuals, which  
5 we did. We've stayed away, at Your Honor's direction, from the  
6 lowest level of folks. We've also stayed away from the very  
7 highest level of folks as well because at a certain point, that  
8 also becomes a little bit meaningless.

9 So we have focused in on folks in the middle; and even  
10 within that, we have horse traded, we've made a deal, and  
11 we've, you know, gotten to these 11.

12 **THE COURT:** Okay. What's Meta's position on this?

13 **MS. SAFFARINI:** Your Honor, I can start by saying,  
14 yes, the reviews do include those exceeded expectations --  
15 Meta's expectations ratings. And so to the extent that  
16 plaintiffs are conceding that that's really what they are  
17 looking for, that already has started to be produced and we're  
18 doing rolling productions for the 11 that we've agreed to.

19 **THE COURT:** So the real dispute is over the dollar  
20 figures then?

21 **MS. SAFFARINI:** It sounds to us like the only thing  
22 that they're asking for is the dollar figure.

23 I would also add that the combination of the policy and  
24 those ratings actually does get plaintiffs what they want, and  
25 it's not really clear to us that the dollar figure is additive

1 in any way, that it is a third leg.

2 And so these policies are highly confidential, so I'm not  
3 able to discuss in detail on the record, but plaintiffs do have  
4 these policies; and if they look at them side by side with the  
5 performance reviews, they do have what they need.

6 **THE COURT:** Do you have -- what's your response to  
7 that?

8 **MS. SCULLION:** Again, so we haven't actually seen the  
9 evaluations and reviews to know if they do consistently have  
10 those -- those indications. So if we could get those and  
11 continue to confirm that.

12 **THE COURT:** It sounds like you are getting them or you  
13 have gotten them.

14 **MS. SAFFARINI:** We have produced for two of the -- I  
15 think there's a kind of rolling as we get them out of our  
16 system and we're kind of targeting as the depositions are  
17 scheduled to make sure we get them ahead of those.

18 **THE COURT:** Have you seen those two that have been  
19 produced?

20 **MS. SCULLION:** I have not, Your Honor. I -- the first  
21 deposition I know of that's coming up for this is actually  
22 still coming up, so I didn't understand they had been produced  
23 yet.

24 **THE COURT:** Okay. So -- well, let me ask you this:  
25 We do have a protective order, and there's certainly case law

1 that says, you know, balance the privacy right, you know, if  
2 there's a compelling need. And there's some support in the  
3 case law for the fact that since you can put it under a  
4 protective order, that helps protect the right to privacy and  
5 mitigate the issue.

6 So why isn't putting the dollar figures under protective  
7 order, even at the highest level, why isn't that sufficient?

8 **MS. SAFFARINI:** Well, Your Honor, plaintiffs haven't  
9 articulated any relevance to the dollar figure at all, and so  
10 even just to begin the balancing, it's a very weak need.

11 On the other hand, there is --

12 **THE COURT:** But I -- so I don't want to put words in  
13 counsel's mouth, but what I heard -- and I'm sure she'll tell  
14 me if I'm wrong -- is that the relevance is that knowing the  
15 dollar figures is the final piece of the puzzle in terms of the  
16 factual record as to how the policy was implemented in terms of  
17 rewarding people based on the results of the review.

18 **MS. SCULLION:** Yes. And I guess I would add,  
19 Your Honor, the actual dollar figure, it's just -- I think it's  
20 just ordinary human nature that the amount of the money can be  
21 more motivating or disincentivizing depending on the actual  
22 amount. I mean, it's not as if the actual amount doesn't  
23 matter to any of us in terms of our incentives.

24 **THE COURT:** Yeah. I mean, hypothetically, since  
25 nobody here -- we're not talking about dollar figures. I mean,



1 if somebody got a zero bonus even though worked hard on  
2 increasing user engagement, that actually hurts the plaintiffs'  
3 case; right? So it's a fact -- the dollar figure has, at some  
4 level, some evidentiary value -- right? -- in the hypothetical  
5 I posed, for example.

6 **MS. SAFFARINI:** Right. And, Your Honor, the policies  
7 would reflect that -- the policies with the performance reviews  
8 would already reflect that without needing -- if it was a zero  
9 dollar, if they received no bonus.

10 I, mean, again, I can't go into the details of the policy,  
11 and it sounds like maybe plaintiff needs some time to review  
12 those now that they have been produced or have started to be  
13 produced.

14 But to the extent plaintiffs claim that they just need to  
15 see the trend year over year in correlation with the  
16 qualitative reviews of what we are producing, that is something  
17 that they can get from the policies we have already produced.

18 **THE COURT:** So the two that have been -- two persons'  
19 materials have been produced, is that everything historical as  
20 well or just their current?

21 **MS. SAFFARINI:** It is -- it's for, I believe, the  
22 relevant time period. We have several years of reviews.

23 **MS. SCULLION:** If I may?

24 **THE COURT:** Yeah.

25 **MS. SCULLION:** Your Honor, I guess I would add, again,

1 just the actual numbers that do matter to see -- just, again, I  
2 think it's human nature to understand what the actual amount  
3 is. Your Honor pointed out if for some reason the numbers are  
4 counter to our story, then, you know, the chips will fall where  
5 they are.

6 My colleague reminds me that the *Pradaxa* court, which we  
7 did cite, did point out that the percentage of increase is not  
8 enough. You need to know the actual amount of compensation  
9 because a 10 percent, you know, bonus on a much lower amount of  
10 compensation is very different from a higher amount of  
11 compensation. So the actual amount is relevant as observed by  
12 the *Pradaxa* court.

13 **MS. SAFFARINI:** And, Your Honor, this is the first  
14 time that plaintiffs have claimed that they need the actual  
15 number. I mean, this whole briefing reflects that they're  
16 talking about the trend. All of our discussions have been  
17 about how they want to show how Meta's conduct in relation to  
18 the plaintiffs -- or in relation to the employee's performance  
19 and how Meta incentivizes the employees, and that is reflected  
20 in the policies.

21 To now kind of try to claim that they -- for the first  
22 time, that they need the dollar amount is at odds with all of  
23 our prior discussions.

24 And also, I mean, as we cited in our briefing, the dollar  
25 amount is not necessarily relevant particularly where you

1 already know that these are Meta employees. Right? So to the  
2 extent you're trying to show bias, the HP court said that: We  
3 already know this person is a full-time employee of HP. You  
4 don't need the dollar value of his compensation to show his  
5 bias.

6 By contrast, some of the cases that plaintiffs cited were  
7 about third parties who are, you know, under kind of a  
8 short-term contingency where perhaps the dollar amount would be  
9 relevant to bias.

10 **MS. SCULLION:** Your Honor, with all due respect, the  
11 entire dispute is about trying to get the specific dollar  
12 amounts. We've always said that that is what is relevant here.

13 And, again, you look at cases like *Pradaxa* that recognize  
14 that, in fact, it's not -- we're not trying to get it to show  
15 bias. We're trying to get it to show the incentives and the  
16 disincentives, and the actual amount that was provided to  
17 someone naturally is understood to be relevant to how much they  
18 were trying to be incentivized or how much Meta was trying to  
19 disincentivize them.

20 **THE COURT:** Okay. But you did make the bias argument  
21 in an offhanded way in your briefing, so -- but I hear what  
22 you're saying, you're not focusing on that.

23 So --

24 **MS. SAFFARINI:** If I may add one other thing the -- at  
25 least on the -- on this part.

1 Plaintiffs have not shown any kind of justification for  
2 this theory that there is a trend that's incentivized in  
3 particular, that these policies even take into account the  
4 kinds of incentives and metrics that they're claiming we are  
5 trying to -- we're trying to encourage. So to the extent that  
6 they haven't even kind of made that initial showing, there  
7 really is no reason to believe that this kind of is anything  
8 more than a fishing expedition.

9 **THE COURT:** Well, without the historical documents,  
10 they can't show the trend. I mean, it's kind of a  
11 chicken-and-egg problem, isn't it?

12 **MS. SAFFARINI:** Well, and as I said, they do have the  
13 historical documents and they do have the trend.

14 **THE COURT:** Yeah.

15 **MS. SCULLION:** I'm sorry. I didn't want to interrupt.

16 **THE COURT:** Last word.

17 **MS. SCULLION:** No, it's just -- I mean, just the  
18 policy, again, just vaguely talks about basically  
19 performance -- your performance. So to actually be able to  
20 see, again, all the pieces together is going to be important as  
21 you're getting into a deposition to understand: Who is this  
22 person in front of you? How are they incentivized?

23 When I'm looking at the documents and looking at why they  
24 made certain choices, what they did, putting it all together,  
25 that story together, to see what the actual compensation was,

1 what the actual result was of this compensation and bonus  
2 policy is critical to being able to weave that story together.

3 **MS. SAFFARINI:** And, Your Honor, I can represent that  
4 that is not an accurate statement about the vague nature of the  
5 policy. The policy is quite clear and specific, and I think  
6 counsel does have that policy.

7 **THE COURT:** Maybe. I took her statement as vague  
8 because she was trying to avoid saying anything in open court.

9 **MS. SCULLION:** I was. I'm happy to hand up to  
10 Your Honor a piece of paper.

11 **THE COURT:** No, I don't need to see that.

12 So are you both here through the CMC tomorrow?

13 **MS. SCULLION:** I am scheduled to return this evening.  
14 If Your Honor would like me to stay and meet and confer, I'd do  
15 that.

16 **THE COURT:** Because it sounds like at least two -- the  
17 files for two people have been produced, and you haven't had a  
18 chance to look at them. What I'm hearing from Meta is that if  
19 you had those, that might -- that might be enough to satisfy  
20 you -- right? -- without -- because we don't know what's in  
21 them. There may be enough detail in there that it actually  
22 allows you to craft the evidentiary record that you want to  
23 craft without knowing the actual dollar figures. I don't know  
24 that. You don't know that either -- right? -- because you  
25 haven't looked at them, admittedly.

1           So I'm going to order you to meet and confer after we  
2           break for today here, and you can stay in the courtroom and  
3           there's an attorney lounge upstairs. It shouldn't take that  
4           long. Hopefully you can pull those files up on your laptop.  
5           Yes?

6           **MS. SAFFARINI:** Yes, Your Honor.

7           **THE COURT:** Okay. And then try to meet and confer and  
8           try to see if either, A, it moots the motion because if  
9           that's -- if it's of such detail and of such a character that  
10          you don't think you need the actual dollar figures, that's  
11          great; or it may reduce the number of people from 11 to some  
12          lower number because, again, I don't know what's in there.  
13          Right?

14          **MS. SCULLION:** It's that -- and I'm happy to do that,  
15          Your Honor. Obviously we will. It's that last part that I  
16          don't know that looking at two is going to tell us about the  
17          balance of them, but we will be happy to look and see what we  
18          can figure out.

19          **THE COURT:** It may or may not.

20          **MS. SCULLION:** Yeah.

21          **THE COURT:** The issue is I don't know because I  
22          haven't looked at them either; right? And so I just want to  
23          hold them open as a possibility, that once you see the detail  
24          that's actually in the -- and I'm -- we're talking about the  
25          entire historical files for these people; right? It may be

1 enough of a trend and enough data and details in there you may  
2 be, like, "Okay. We actually only need it for these people."  
3 Or it may not. Right?

4 **MS. SCULLION:** And, Your Honor, after we've met and  
5 conferred to --

6 **THE COURT:** Then submit a joint -- put something on  
7 the record in the docket saying that, you know, you met and  
8 conferred and were still unable to resolve the motion, and I'll  
9 issue an order then. Okay?

10 **MS. SAFFARINI:** Your Honor, and to just at least put  
11 on the record as well that in addition to the tenuous relevance  
12 of this information, plaintiffs' request should be denied  
13 because it goes back on several agreements that they've made in  
14 discovery that we have already closed out compensation-related  
15 requests based on RFP 123.

16 **THE COURT:** I saw that and saw a dispute as to whether  
17 they waived their rights to that, and I don't -- I mean, I take  
18 the point, but I don't think that's -- if it was a situation  
19 where they didn't respond on the issue and were saying -- but,  
20 you know, there's a real dispute there. So try to work it out,  
21 if you can. If you can't, then I'll issue an order on it. But  
22 I understand the argument. I'm just -- I'm not quite that  
23 persuaded by it, so I'm probably not going to reach the merits  
24 of it unless I have to. Okay?

25 **MS. SAFFARINI:** Right. And perhaps just the one point



1 that might help on that is that for the -- Meta actually went  
2 through the -- all of the custodians and identified the one  
3 individual who is not subject to those policies and then  
4 provided additional information about his compensation, which,  
5 again, shows that Meta was intending to wrap up this entire  
6 dispute, and that was the conversation that was had at the  
7 time.

8 **MS. SCULLION:** Your Honor, I think we explained in the  
9 papers the RFP asked for policies. When there was a dispute,  
10 you know, one of the things that was discussed in the meet and  
11 confer was: Well, then just provide us the actual compensation  
12 numbers.

13 But the resolution of that was not that we said, "Okay.  
14 Now we're never getting, you know, compensation numbers because  
15 you've now agreed to give us the policies."

16 I mean, it's -- it feels like they're taking a potential  
17 resolution that was offered in a meet and confer in order to  
18 address what ultimately was not an objection that they stood  
19 behind and now trying to say that was a waiver of something,  
20 and I've -- that makes no sense to me. That's not how a meet  
21 and confer works. That's not what that particular RFP was  
22 about, and it's certainly nothing we actually did waive in  
23 those discussions.

24 **THE COURT:** I've heard both sides on that point.  
25 Anything further on this motion?

1           **MS. SCULLION:** No, Your Honor.

2           **MS. SAFFARINI:** No, Your Honor.

3           **THE COURT:** So submit something, if you can, today  
4 after the meet and confer. Just let me know if I need to issue  
5 an order on it. Okay?

6           **MS. SCULLION:** Thank you, Your Honor.

7           **THE COURT:** All right.

8           **MS. SAFFARINI:** Thank you, Your Honor.

9           **THE COURT:** Okay. All right. Mr. Yeung, should we go  
10 back to where we left off with you?

11           **MR. YEUNG:** Sure.

12           So let me start by clarifying one thing that I said about  
13 Pennsylvania. My understanding is that they've now agreed to  
14 provide search terms and custodians, but it won't be until  
15 early December. I imagine they may need to revisit that plan  
16 given the deadlines now.

17           **THE COURT:** Okay. Good.

18           **MR. YEUNG:** So in terms of the other states, other  
19 agencies, we already talked about California.

20           Georgia had been refusing, but they're also agreed --  
21 they've also agreed to stipulate to dismiss their case with  
22 prejudice, so I think we can skip them.

23           New York, the Division of Budget and the Governor's -- and  
24 the governor have refused to provide search terms and  
25 custodians.

1           **THE COURT:** Hold on.

2           Okay. So New York. Give me the names again.

3           **MR. YEUNG:** Division of Budget and the Governor's  
4           Office.

5           **THE COURT:** Have they stated to you why they're  
6           refusing to provide custodians or search terms?

7           **MR. YEUNG:** Same position of California essentially,  
8           that they're not subject to this Court's orders.

9           **THE COURT:** Okay. Is there counsel for New York in  
10          the room today?

11          **MR. COCANOUGH:** No, sir, Your Honor.

12          **THE COURT:** Okay.

13          **MR. COCANOUGH:** But I believe -- I believe counsel  
14          for New York was going to come because they were going to do  
15          letter briefing, and then they ended up not doing letter  
16          briefing. I think they believed that the issue was resolved,  
17          so I don't believe they're here today, but we can certainly try  
18          to contact their counsel.

19          **MR. YEUNG:** We told them to hold off on the letter  
20          briefing because the counsel for the governor and the Executive  
21          Office was going to provide a proposal to us yesterday, which  
22          they did.

23          My -- what I'm reacting to now is what has happened since  
24          that proposal. There's still nothing on the Governor's Office.  
25          There's still nothing on the Division of Budget.

1           What they did give us yesterday were -- sorry -- were  
2           search terms for the Department of Mental Health, the  
3           Department of Health, and the Office of Children and Family  
4           Services, and the Council for Children and Families. So those  
5           agencies are not in compliance with the custodian aspect of  
6           Your Honor's orders.

7           So it was not brought to letter briefing because the world  
8           changed a little bit since we last spoke on the issue.

9           **THE COURT:** So wait. You got a proposal yesterday  
10          from?

11          **MR. YEUNG:** The counsel to the New York Governor's  
12          Office, the Executive Chamber, who represents, as I understand  
13          it, all six of the agencies that I just mentioned for New York.

14          **THE COURT:** But you just told me the Governor's Office  
15          is refusing to provide.

16          **MR. YEUNG:** They provided for their office. They have  
17          not -- they've refused to provide, but their position is --

18          **THE COURT:** For their office.

19          **MR. YEUNG:** Their position is that they also represent  
20          some other executive agencies.

21          **THE COURT:** Okay.

22          **MS. O'NEILL:** May I speak, Your Honor? Megan O'Neill  
23          on behalf of the State AGs.

24          I've just been in communication with counsel for the  
25          New York AG and just have a brief update.

1       The New York AG has been facilitating conferrals with all  
2       of the relevant State agencies. The agencies are not refusing  
3       to comply with the orders. The negotiations are ongoing, and  
4       the AG thinks that productive conferrals can still continue.

5               **THE COURT:** Including for the Division of Budget and  
6       the Governor's Office itself?

7               **MS. O'NEILL:** That is my understanding.

8               **THE COURT:** Okay. Well, I'd suggest you reach out to  
9       them immediately and see if you can jump start those  
10      discussions.

11              **MR. YEUNG:** Yep.

12              **THE COURT:** Okay. Is there anybody else I need to  
13      know about who's refusing to provide custodians and search  
14      terms?

15              **MR. YEUNG:** So for Rhode Island, my understanding is  
16      that on -- they're going to provide us with a reason why  
17      certain agencies do not need search terms or custodians, but  
18      they're not -- they haven't given that to us yet and they  
19      haven't agreed to do search terms and custodians.

20              **THE COURT:** Is there anybody from Rhode Island here?

21              **MR. COCANOUGH:** No, Your Honor, but I can check with  
22      their counsel.

23              It's my understanding from previous discussions with him  
24      that they are working to get search terms and custodians for  
25      each of their agencies. It was not -- it was not represented

1 to me that any of the Rhode Island agencies are completely  
2 refusing to provide search terms and custodians.

3 **THE COURT:** Okay. Again, as with the previous  
4 discussions about those two New York departments and divisions,  
5 you ought to follow up with Rhode Island.

6 **MR. YEUNG:** We'll follow up with them.

7 **THE COURT:** Okay.

8 **MR. YEUNG:** The South Carolina's Governor's Office.  
9 (Pause in proceedings.)

10 **MR. YEUNG:** The South Carolina Governor's Office.

11 **THE COURT:** They are refusing to provide custodians  
12 and search terms?

13 **MR. YEUNG:** Correct.

14 **THE COURT:** Okay. Anybody from South Carolina here?

15 **MS. O'NEILL:** Megan O'Neill for the State AGs.

16 No, but that is my understanding of the position of the  
17 South Carolina Governor's Office.

18 **THE COURT:** That they -- as with those eight  
19 California agencies, they are not going to provide custodians  
20 or search terms?

21 **MS. O'NEILL:** Excuse me, I would appreciate a moment  
22 to confirm that, if that's possible.

23 **THE COURT:** Sure.

24 **MS. O'NEILL:** Thank you.

25 **THE COURT:** Okay. Let's move on. Anybody else?

1           **MR. YEUNG:** For South Dakota, the Office of the  
2 Governor and the Bureau of Finance and Management.

3           **THE COURT:** Anybody from South Dakota here today?

4           **MR. COCANOUGH:** No, Your Honor.

5           **THE COURT:** Okay. All these states have stuck you  
6 with it, so can you confirm that they are not providing  
7 custodians and search terms because they don't -- they just  
8 don't feel like they're required to because they don't believe  
9 in the order or...

10          **MR. COCANOUGH:** I will -- I will reach out to them  
11 right now.

12          **THE COURT:** Okay.

13          **MR. COCANOUGH:** And that was -- sorry. Could you  
14 tell me --

15          **THE COURT:** Office of the Governor and Bureau of  
16 Finance and Management.

17          **MR. YEUNG:** Bureau -- correct.

18          **THE COURT:** Okay. Anyone else?

19          **MR. YEUNG:** So we did cover Minnesota already  
20 previously. Our understanding of their position is that the  
21 three agencies in discussion, that the Department of Commerce,  
22 the Governor's Office, and the Office of Higher Education, that  
23 they're not going to provide search terms and custodians I  
24 believe based on -- is it relevance grounds or some other  
25 grounds? But we're not getting them.



1           **MS. MICKO:** Good afternoon. Caitlin Micko on behalf  
2 of the State of Minnesota.

3           These three agencies -- Commerce, the Office of Higher  
4 Education, and the Governor's Office -- have asked to be  
5 deprioritized after conducting a reasonable search and  
6 concluding that they had no responsive documents, and Meta has  
7 refused to deprioritize them or engage or provide clarity on  
8 what they are looking for from these agencies despite our  
9 requests.

10          They are continuing to negotiate, however, and on Monday  
11 they agreed to provide information about the process that they  
12 undertook to reach that decision. So meet and confers are  
13 ongoing.

14           **THE COURT:** Okay. It sounds like you need to wrap it  
15 up with them and figure out if you want to deprioritize them or  
16 not.

17           **MR. YEUNG:** Understood.

18          There are a number of other agencies that -- from  
19 individual states where -- who are not agreeing to supply  
20 search terms and custodians for a variety of reasons, but we  
21 are still talking with them.

22           **THE COURT:** Okay.

23           **MR. YEUNG:** I can run down that list as well. We're,  
24 you know, continuing to talk with them.

25           **THE COURT:** Is it -- well, let me make the question a

1 little more pointed. Are they not providing custodians and  
2 search terms because of ongoing negotiation about overbreadth  
3 and burden; or are they not providing custodians and search  
4 terms because, as stated on behalf of those eight California  
5 agencies, they don't believe they're subject to the Court's  
6 jurisdiction and they don't believe they are subject to party  
7 discovery?

8 **MR. YEUNG:** I think it's -- I don't have them broken  
9 out in that level of detail. I know some of them certainly  
10 fall into the bucket of "We have done our work. We don't think  
11 we have relevant documents." We've gone back and we said, "But  
12 what about this or that?" And there's discussion going on.

13 There are some Governor Offices included in that bucket.  
14 I'm just not -- I haven't been engaged in those discussions  
15 personally, so I don't know if it's of the nature of, you know,  
16 "We're refusing for the moment because we're outside the  
17 jurisdiction but we're willing to talk." Right? These are all  
18 states who have said, "We're willing to talk."

19 **THE COURT:** Okay. So if they're willing to talk, for  
20 now I won't put them in the bucket of -- the bucket of type of  
21 refusal that I'm searching for.

22 Okay. Is there anyone else that falls into that bucket,  
23 essentially of taking the position similar to those California  
24 agencies and the Governor's Office for South Carolina, which  
25 are the nine that I'm aware of right now?

1           **MR. YEUNG:** I don't believe so.

2           **THE COURT:** Okay. It sounds like we've got updates.

3           **MS. O'NEILL:** Yes. Again, Megan O'Neill for the State  
4 AGs.

5           I have confirmed with the South Carolina AG's Office that  
6 the South Carolina Office of the Governor has not thus far  
7 provided them access to the documents. They would like to note  
8 that they thought that they were in productive conferrals with  
9 Meta regarding whether a Rule 45 subpoena could be issued  
10 instead, but that is the status as far as I'm aware.

11           **THE COURT:** Okay. As I stated earlier, in light of my  
12 order, subpoenas are no longer -- if I've ruled that that  
13 agency is subject to party discovery, because I didn't do it  
14 for every agency, but, yeah, okay, not applicable in this  
15 particular case I don't think. All right.

16           **MS. O'NEILL:** Thank you.

17           **MR. SCHMIDT:** Your Honor, may I just say one thing on  
18 this? Paul Schmidt for Meta.

19           I think what you're hearing is this has been a really  
20 involved process. We've heard loud and clear from the Court  
21 that the Court wants us to be conferring, and that we shouldn't  
22 dig in on formalities where we can work things out with them.

23           What we have seen -- so we have been doing that and that's  
24 taken a lot of people from our team.

25           What we have seen is two things that have made that very

1 challenging. One is, with a number of the agencies we have not  
2 gotten progress until we're on the verge of going to the Court  
3 and suddenly we get progress. That's frustrating in terms of  
4 moving things ahead, but we've been working that out and we  
5 have made progress in that way.

6 The second thing, and I just want to flag this for the  
7 Court because I think it's going to be potentially a big bucket  
8 of agencies we come back to the Court with, is there are a  
9 large number of agencies, and we heard it hear from Minnesota,  
10 where they're saying, "We want you to figure out how to not  
11 burden us with your discovery," when we've served them with  
12 discovery, we're willing to give them search terms, and we're  
13 not getting either search terms or hit reports back.

14 And those ones I think we're going to be back to the Court  
15 on some of those. And we're fine continuing to negotiate, we  
16 will. We'll narrow, as we've been doing, where that's  
17 appropriate; but I think there's going to be a number of those  
18 we come back to the Court on because their view is, even though  
19 the Court said search terms, even though the Court said  
20 custodians, even though the Court said today hit reports, we're  
21 not getting those.

22 And if we can look at them and say, "All right, we can  
23 live without that," we will, but we're not going to be able to  
24 do that for all of them where they're essentially trying to put  
25 the burden on us to figure out for them what they think is

1 relevant when we tried to do that through search terms and  
2 through the document requests at the outset.

3 **THE COURT:** Let me put a pin in that. If it's -- some  
4 of it sounded -- tell me if I'm wrong. I've forgot her name,  
5 the counsel from Minnesota.

6 Three of the agencies from Minnesota have been -- despite  
7 not getting agreement on search terms, they've been producing  
8 and collecting documents and getting them to you. Is that --  
9 are my notes correct on that or on the process of doing that?

10 **MS. MICKO:** There's -- Your Honor, Caitlin Micko for  
11 the State of Minnesota.

12 There's two agencies. One agency has completed its  
13 production. Another one will complete this week.

14 **THE COURT:** Okay. And I thought Department of Human  
15 Services was also working on producing and collecting  
16 documents.

17 **MS. MICKO:** That's right.

18 **THE COURT:** And then Department of Education also.

19 **MS. MICKO:** Is working on production.

20 **THE COURT:** Right. So --

21 **MS. MICKO:** That's forthcoming.

22 **THE COURT:** Right. So there are three agencies -- so  
23 if it's a situation like that where you've got agencies where,  
24 okay, they technically haven't complied with my order and you  
25 don't have search terms or custodians but they've actually

1 collected and they're producing documents, then I think it's  
2 incumbent on the agencies to explain to Meta how you found the  
3 documents.

4 **MR. SCHMIDT:** Yes.

5 **THE COURT:** If you didn't use their search terms or an  
6 agreed set of search terms, you need to be transparent with  
7 them on how you did that. It can be done verbally. It doesn't  
8 need to be done in a supplemental response to the document  
9 request unless there's going to be a real dispute over that;  
10 right? But even then, hopefully it can just be done by letter  
11 brief. Okay?

12 **MS. MICKO:** Your Honor --

13 **MR. SCHMIDT:** That's all I'm asking for, Your Honor.  
14 It seems fundamentally unfair to us to say, "We've got a  
15 certain amount mass, 5,000, 10,000, whatever it is, you're  
16 done," and we don't know how they got that mass, we don't know  
17 what might have been missed. That's what we're pushing on, you  
18 know, and that's where I think Your Honor has already ruled.  
19 For every agency you addressed that question with search terms  
20 and custodians and hit reports.

21 **THE COURT:** And, again, if an agency chooses not to go  
22 down that road but they are transparent with you about how they  
23 got the documents and that resolves the issue, as you said,  
24 Meta should live with it -- right? -- because it may not be  
25 perfect but it may be good enough.

1           **MR. SCHMIDT:** Yeah. I think the question is if that  
2 resolves the issue. If it truly does, then we're being  
3 reasonable. If it doesn't and we have questions, then we've  
4 got a court order from Your Honor saying search terms and  
5 custodians, and that's the default mechanism. That's certainly  
6 what we followed in meeting their discovery requests. That's  
7 what they should do.

8           But we will look at what they give us. If we have these  
9 exceptions where they started before that order and they're  
10 saying, "This is good enough," if we can understand and get  
11 that comfort, then we'll work with them on that.

12           **THE COURT:** I expect you to be, you know, as hopefully  
13 you do in your negotiations, be flexible and, you know,  
14 cooperative with each other. Because, again, if it's a  
15 situation where they produced some thousands of documents  
16 already and they tell you how they found them, maybe wrap it up  
17 by giving some -- you know, a follow-up go-get-them request.  
18 In other words, you don't need to start from scratch on search  
19 terms and all that if you just think there's some stuff  
20 missing. Right? And then you can negotiate whether there's  
21 some, you know, cleanup to do it.

22           I rather you try to work it out that way informally as  
23 opposed to try to start from scratch with trying to then craft  
24 search terms and all that because that's going to mess up the  
25 schedule.



1           **MR. SCHMIDT:** Yeah, and we're not saying anything  
2 different. Our only view is having fought and lost this issue  
3 for the better part of a year, they shouldn't now be able to  
4 say, "We're going to win this issue on the backside just by not  
5 complying."

6           If they have another way of complying and it's a  
7 reasonable way, we'll work with them on that.

8           **THE COURT:** All right.

9           **MR. NGUYEN:** Your Honor, Thomas Nguyen for the State  
10 of New Jersey.

11           I just do want to make a quick note for the record. So  
12 New Jersey provided Meta with search terms; and during our meet  
13 and confer, Meta stated that they would redline them and  
14 provide them back to us, especially with regards to the  
15 location limiters or spacing limiters between different terms.

16           Instead, Meta did exactly what Your Honor warned them not  
17 to do, which is to start completely over and provide new search  
18 terms as a wholesale, and they did this after waiting 19 days  
19 beforehand.

20           So with regards to New Jersey, we would just ask  
21 Your Honor to remind everyone that to the extent that there are  
22 search terms being proposed, that we don't start over. And  
23 Your Honor did so previously, but we would just encourage  
24 further encouragement there, Your Honor.

25           **MR. YEUNG:** New Jersey is maybe the one state who has

1 provided more than a handful of search terms.

2 And what we had asked them to do was, "Let's -- you know,  
3 we've got two search term proposals. Give us the hit reports  
4 and then we can have a discussion." We haven't gotten the hit  
5 reports for -- at least for our terms, as I understand it, but  
6 we're willing to work with them.

7 But I also don't want the New Jersey experience to be  
8 informative for the rest of the AGs because it's very  
9 different. The -- I mean, terms that we've been getting from  
10 the other AGs are 8 to 15 -- anywhere between 8 to 15. I told  
11 you about the four I got from New York, which, you know, is  
12 low. It's very different from what's going on with New Jersey.

13 But we're -- our request with New Jersey was: Give us the  
14 hit reports and let's have a discussion about which terms are  
15 ripe. And we haven't received those yet.

16 **MR. NGUYEN:** Your Honor, may I clarify?

17 So with regard to the hit reports, we presented Meta with  
18 our search terms, but Meta didn't indicate one way or the other  
19 whether or not they would accept them for the purpose of  
20 running hit reports. Instead, providing wholesale a new set of  
21 terms, which were much more expansive and also don't have any  
22 location limiters but regards to the terms are rather just mere  
23 and/or statements.

24 So with regards to the hit reports, we, of course, take to  
25 heart that hit reports are an effective way to provide a metric

1 through which Your Honor and, of course, Meta can assess the  
2 viability of certain terms, but we would need guidance about  
3 whether or not the hit reports should be run on Meta's terms  
4 that they proposed wholesale or our original terms.

5 Because we were under the impression originally that we  
6 were operating under the terms that we proposed, but then Meta  
7 then proposed new terms which were being introduced to other  
8 states but really didn't make sense given that New Jersey  
9 provided very tailored terms to the responses -- or requests, I  
10 should say, Your Honor.

11 **THE COURT:** Well, I mean, why not both? I mean, you  
12 could run the search terms on both. I mean, is there anything  
13 stopping you from doing that?

14 **MR. NGUYEN:** There is a resource concern, Your Honor,  
15 given that a lot of these agencies are using Microsoft Purview,  
16 if I recall correctly, which we're running across, like, the  
17 custodians documents. So it's not as if they're exporting it  
18 and running it on a different site. So there are technical  
19 limitations, as well as bandwidth limitations, as well as  
20 manpower limitations associated with running these hit reports.

21 **THE COURT:** So at a minimum, I mean, you proposed the  
22 search terms, you ought to run the hit reports on your own  
23 search terms. And if you can show the hit reports show that  
24 you're returning, you know, a sufficiently large number of  
25 documents, then that could inform how Meta approaches the

1 further negotiations. Right?

2 And, Meta, if there are competing more than a handful of  
3 search terms on both sides, you know, at some point the  
4 ordering of whether you get the search terms before you  
5 modify -- get the hit reports before modifying the search terms  
6 and all that, in this situation, I think you should be flexible  
7 and you should be talking --

8 **MR. YEUNG:** Understood.

9 **THE COURT:** -- more iteratively about this. Okay?

10 **MR. YEUNG:** Understood.

11 **MR. NGUYEN:** Makes sense to us, Your Honor, and we'll  
12 provide guidance to the State agencies to begin running those  
13 hit reports and also to work with Meta in an iterative fashion.

14 **THE COURT:** Okay. Yep. All right.

15 **MR. NGUYEN:** Thank you.

16 **THE COURT:** Okay. Just so I'm clear -- so -- oh, wait  
17 a minute. Is there going to be somebody try to confirm with  
18 South Dakota or not?

19 **MR. COCANOUGH:** I'll do that right now.

20 **THE COURT:** Yeah.

21 **MR. COCANOUGH:** I apologize, Your Honor. I was  
22 going to see if any other states were called that I need to  
23 come up there.

24 **THE COURT:** Okay.

25 All right. So just so I'm clear -- and just somebody

1 stand up and tell me if I'm wrong -- those agencies that are  
2 not complying with the orders from myself and  
3 Judge Gonzalez Rogers are the eight California agencies listed  
4 previously; and so far the Governor's Office for South Carolina  
5 and possibly, subject to confirmation, the Office of Governor  
6 and the Bureau of Finance and Management for South Dakota? Am  
7 I missing anybody or have I overincluded anybody?

8 **MR. YEUNG:** I think there are the Rhode Island  
9 agencies; the New York agencies, which -- I understand that  
10 we're going to reach out to them. But those two.

11 And then there's -- again, there is this bucket of  
12 agencies who have taken -- specific agencies who have taken  
13 various positions on whether or not search terms and custodians  
14 are appropriate, but we're still meeting and conferring with  
15 them so I haven't identified them.

16 **THE COURT:** No, we're only talking about --

17 **MR. YEUNG:** Yeah.

18 **THE COURT:** So New York and Rhode Island sound like  
19 they want to talk to you, so --

20 **MR. YEUNG:** Yes, and we're going to reach out. I  
21 mean, yeah. Yeah.

22 **THE COURT:** So I'm not going to put them in this  
23 refusal bucket or true holdout bucket.

24 **MR. YEUNG:** Sure.

25 **THE COURT:** Okay. While we're waiting for

1 confirmation about South Dakota, let's do this: So in the CMC  
2 Joint Statement, Docket 1337, for Judge Gonzalez Rogers, the  
3 parties raised a question about clarifying whether  
4 Judge Gonzalez Rogers' order should be clarified in light of my  
5 order or orders, and whether production, according to Meta's  
6 Rule 45 subpoenas, is intended to take place in lieu of  
7 producing in response to Meta's request for production under  
8 Rule 34 for the agencies in receipt of such a Rule 45 subpoena.

9 Who's going to speak to that issue? Because I will let  
10 you know, I've conferred with Judge Gonzalez Rogers on this  
11 issue and since this is essentially a request to clarify her  
12 order but also in light of my order or my orders in light of  
13 her order, it's my order too, so I'm going to -- so I'm here to  
14 clarify. So --

15 **MR. SCHMIDT:** We think we have the Court's guidance.  
16 We don't think there's anything to clarify with  
17 Judge Gonzalez Rogers.

18 **MS. O'NEILL:** Megan O'Neill for the State AGs.  
19 We disagree.

20 **MR. SCHMIDT:** Sorry. Can I say just one more thing?  
21 To the extent there is something to clarify, it's really  
22 just asking Judge Gonzalez Rogers in a procedural and  
23 appropriate way to reverse what Your Honor did.

24 We had a ruling from Judge Gonzalez Rogers that said,  
25 "Coordinate, continue complying with Judge Kang." We had a

1 ruling the next day from Your Honor saying, "Here's what you  
2 need to do to comply."

3 There's really no question, in our view, that needs  
4 clarification. If they want to appeal Your Honor's ruling,  
5 that would be misplaced we think, but that's not what they're  
6 purporting to do.

7 **THE COURT:** Appeal to the Ninth Circuit you mean?  
8 They've already appealed.

9 **MR. SCHMIDT:** Well, I think they're trying to appeal  
10 again the latter ruling, the day-after ruling.

11 **THE COURT:** Okay.

12 All right. Go ahead.

13 **MS. O'NEILL:** Thank you, Your Honor.

14 We do think that there is a lack of clarity as to how the  
15 different orders interact, and we are not seeking to relitigate  
16 issues that this Court has already decided, but we do think  
17 that there is some ambiguity as to how the Court's October 30th  
18 order -- excuse me -- YGR's October 30th order and your  
19 later -- Your Honor's --

20 **THE COURT:** Did you say "YGR's"?

21 **MS. O'NEILL:** Excuse me, Judge Gonzalez Rogers.  
22 Sorry. Judge Gonzalez Rogers'. You can have preview into my  
23 notes -- my note taking here.

24 -- and Your Honor's later discovery management order.

25 The October 30th order reinstated the Rule 45 subpoenas



1 that Meta served on several State agencies of course. It  
2 directed the parties to immediately resume and continue  
3 document productions based on those subpoenas.

4 The Court also stated that the parties should comply with  
5 Your Honor's orders, of course, regarding timing and procedures  
6 to complete discovery but, quote, "to the extent that Rule 45  
7 subpoenas were not issued."

8 Our position is that that order is clear that  
9 Judge Gonzalez Rogers was directing the parties to focus on the  
10 Rule 45 subpoenas to the extent that they were issued. And so  
11 those agencies who were issued Rule 45 subpoenas should, at  
12 least in the interim, focus on completing the productions under  
13 those subpoenas and not being forced to start from scratch with  
14 search terms and custodians and party discovery where they were  
15 already far along the road of complying with the Rule 45  
16 subpoenas and producing under those subpoenas.

17 We think that's a more efficient result that's going to be  
18 the result -- or that's the procedure through which we can get  
19 documents -- the agencies can get documents produced most  
20 quickly and most efficiently for this case.

21 **THE COURT:** So just so there's complete clarity, I'm  
22 not going to speak for Judge Gonzalez Rogers, but the Court  
23 does not believe those orders in conjunction are unclear in any  
24 way.

25 Okay. So, yes, to the extent agencies have been

1 subpoenaed, they are to complete the collection and production  
2 of documents pursuant to those subpoenas and work with Meta to  
3 negotiate that. But to the extent Meta has served Rule 34  
4 requests for production that reached those agencies, now to the  
5 extent that Meta has done so, presumably Meta is being  
6 judicious and not seeking to start from scratch completely with  
7 duplicative requests for production that duplicate what's in  
8 the subpoenas or, you know, essentially trying to do a do over  
9 from what's in the subpoenas. Right? And so I'm assuming  
10 everybody is acting reasonably here.

11 I view the way you should be going forward is that you  
12 should be, A, yes, focusing on getting the documents in  
13 response to the subpoenas out, of course; but to the extent  
14 there are requests for production that are outside the scope of  
15 the subpoenas and what's sought there -- right? -- and, again,  
16 I think the assumption has been that what you asked -- what  
17 Meta asked for in the subpoenas is kind of both from the  
18 priority -- prioritized agencies and the prioritized sets of  
19 documents from those agencies, presumably hopefully there won't  
20 be a lot of requests for production directed to those agencies  
21 that need follow up on, but presumably there will be some.  
22 Right?

23 And that -- I don't see anything in either order that says  
24 that should be held in abeyance, and so there needs to be equal  
25 effort made to getting those documents, you know, searched for

1 and produced and, as I said at the top of this hearing, get  
2 this done. Okay?

3 **MS. O'NEILL:** Thank you, Your Honor.

4 **MR. SCHMIDT:** Thank you, Your Honor.

5 **MS. O'NEILL:** I appreciate that.

6 And can I ask for just one clarification?

7 **THE COURT:** Sure.

8 **MS. O'NEILL:** I think it would be very helpful for the  
9 State agencies for Meta to identify specifically what they are  
10 looking for above and beyond what was called for in the  
11 subpoenas and what negotiations had resulted in over those  
12 Rule 45 subpoenas, so that the State agencies can really  
13 understand and not duplicate efforts between the Rule 45  
14 subpoenas and the Rule 34 discovery. I think that would be  
15 helpful and efficient for both parties.

16 **THE COURT:** I was hoping that you would have done that  
17 between yourselves anyway. I would have hoped that some  
18 paralegal somewhere would have taken the requests and the  
19 subpoenas and compared them to the document requests and  
20 cross-checked which ones line up and which ones don't. No?

21 **MR. SCHMIDT:** I -- we have -- we've been doing that on  
22 our end.

23 I don't think there's a ripe dispute on this issue before  
24 the Court. They've certainly not identified in their  
25 submission to Judge Gonzalez Rogers anything that is ripe on

1 this dispute other than that they don't want to do search terms  
2 and custodians.

3 And nothing about Judge Gonzalez Rogers' ruling exempted  
4 them from that. It just says, "Work on the subpoenas where  
5 there's subpoenas." That doesn't preclude search terms. And  
6 the next day Your Honor confirmed that by saying, "Do search  
7 terms."

8 We have two groups of states. One that already agreed and  
9 maybe wants to get out, and one that was ordered to both before  
10 and after by Your Honor and they're trying to get out.

11 That's not proper, and it's especially not proper when we  
12 think of how this arises. The only reason we have these  
13 subpoenas is because the way the states briefed this issue, it  
14 took time for the Court to resolve this issue. And Your Honor  
15 said to us in that time, "Try to be efficient. Go out and do  
16 subpoenas."

17 We did that, and now they're saying: Oh, we lost this  
18 issue, but you started the subpoenas so excuse us from what  
19 some of them agreed to and some of them were twice ordered to  
20 before and after Judge Gonzalez Rogers' ruling, and we don't  
21 think that's a proper request for relief.

22 **MS. O'NEILL:** Your Honor, I think you already --  
23 excuse me.

24 **THE COURT:** So you made your point, but I think you've  
25 already won so you don't need to make that point again.

1           **MR. SCHMIDT:** Okay. Thank you, Your Honor.

2           **MS. O'NEILL:** And I would just like to say, I meant no  
3       disrespect to Judge Gonzalez Rogers. It's been quite a day. I  
4       appreciate your indulgence with that.

5           **THE COURT:** Yes, I will agree. I don't take it that  
6       you meant her any disrespect.

7           **MR. SCHMIDT:** Your Honor, I know Your Honor doesn't  
8       speak for Judge Gonzalez Rogers, but does this resolve this for  
9       tomorrow or shall we --

10          **THE COURT:** She will have her own things to say on  
11       this issue to you.

12          **MR. SCHMIDT:** Okay. Thank you, Your Honor.

13          **MS. MICKO:** Your Honor, on the same point, though, I  
14       just want to be clear for the record that you indicated that  
15       you expect Meta to not restart the process, but that has been  
16       Minnesota's experience so far, is that Rule 45 agencies who  
17       have either completed or substantially completed and negotiated  
18       their subpoenas are being asked to restart the process all  
19       over. And so that's, you know, part of where we're seeing  
20       these orders differently.

21          **THE COURT:** So this goes to the second part of what I  
22       said, which is, presumably -- we're only -- to the extent we're  
23       talking only about party discovery now to those agencies who  
24       were subpoenaed, it's only party discovery that's  
25       nonduplicative of what's in the subpoenas.

1 And, again, I said hopefully it's not that many requests  
2 because, presumably, what was asked from the agencies in the  
3 subpoenas is the core of what you wanted anyway. Right? And  
4 understanding that Minnesota is in a slightly different  
5 position because you voluntarily produced the documents without  
6 reaching agreement on the search terms.

7 Again, if you share how you found the documents, again,  
8 that may resolve everything as well. Right? And it may  
9 resolve whatever document requests they think weren't covered  
10 by the subpoenas that they need to get more discovery on is  
11 what I'm saying. Right?

12 **MR. SCHMIDT:** Yes.

13 **THE COURT:** I don't know what you did; right?

14 **MR. SCHMIDT:** Just to illustrate that concretely, for  
15 one of the Minnesota agencies, my understanding, I think it's  
16 consistent with counsel -- counsel's representation earlier, is  
17 they've produced 13,500 documents. If they tell us how they  
18 found them and they included looking across their surfaces and  
19 their sources, that might answer it. It might be that they  
20 just pulled down some public stuff, then that wouldn't answer  
21 it.

22 Another agency produced eight documents. That -- it's not  
23 saying we're starting over to say, "We don't think that's fair.  
24 We don't think you clearly used search terms. And if you did,  
25 tell us what you used and what it hit on." That is a different

1 discussion.

2 **THE COURT:** I assume that's the agency that's in the  
3 process of still producing stuff.

4 **MS. MICKO:** Yeah. That's not a fair representation.  
5 They've communicated this week about exactly what they did for  
6 their production, to answer your question, and they have a much  
7 more voluminous production forthcoming.

8 **THE COURT:** Okay. So --

9 **MR. SCHMIDT:** I'm not representing they're done. I'm  
10 just telling the Court where it is now. That's all.

11 **THE COURT:** I take your point. It's not really ripe  
12 as to -- because I don't -- hopefully you're able to work  
13 out -- if there's party discovery document requests to agencies  
14 that have been subpoenaed, hopefully you're able to work out  
15 what that is. And, again, I'm going to caution Meta not to  
16 overreach there and be judicious in terms of what you seek over  
17 and above what was in the subpoenas.

18 **MR. SCHMIDT:** Yeah, we've -- if I could say two things  
19 on that, Your Honor.

20 We have had the view that they have been successful in  
21 getting much more from us than we can get from them, and that  
22 doesn't seem fair on our side.

23 We have also heard loud and clear what Your Honor said  
24 about being judicious and being targeted, and we're acting on  
25 that.



1           **THE COURT:** Okay. One of the unfortunate truths of  
2 life is that is often unfair.

3           **MR. SCHMIDT:** That's why we have courts, Your Honor.

4           **THE COURT:** I was once told by a judge on the  
5 East Coast.

6 All right. So anything further?

7           **MS. MICKO:** No. Thank you, your Honor.

8           **MR. SCHMIDT:** Thank you, Your Honor.

9           **THE COURT:** Yeah.

10          **MR. WHELIHAN:** Nathan Whelihan for the Arizona  
11 Attorney General's Office.

12 I just wanted to put on the record that for Arizona, Meta  
13 has made the same representations to us that the Rule 45  
14 subpoenas, they've called them a subset of the 34, but when we  
15 asked them to clarify how they're a subset or what -- the  
16 subset what they would need additional, they say they're two  
17 different things.

18 And so I just want to put that on the record, that Meta  
19 has not approached this with Arizona from the perspective of,  
20 "Oh, well, if you tell us how you did that, we might be  
21 satisfied with that." You know, they've treated them as: You  
22 have to do that and you have to do it again. So --

23          **MR. SCHMIDT:** I don't know that that's a fair  
24 representation, but we'll talk with them.

25          **THE COURT:** Work it out, and then presumably you're

1 going to be cooperative and transparent about which you think  
2 are duplicative and not requested production that need be  
3 followed up on and which are still at least open to discussion  
4 as to whether there needs to be anything further done.

5 **MR. SCHMIDT:** We hear loud and clear Your Honor's  
6 direction in that regard.

7 **THE COURT:** Okay.

8 **MR. SCHMIDT:** Your Honor, if we've had our list of  
9 states come up, my colleague --

10 **THE COURT:** No, no. South Dakota is still --

11 **MR. COCANOUGH:** Your Honor --

12 **THE COURT:** Yes.

13 **MR. COCANOUGH:** -- I've e-mailed and called all the  
14 numbers I have and have not been able to --

15 **THE COURT:** So you can tell your colleague from  
16 South Dakota that they're on the list as a true holdout for  
17 now, but they can always raise that with Judge Gonzalez Rogers  
18 at a different point in time and with me. Okay?

19 **MR. COCANOUGH:** Thank you, Your Honor.

20 **MR. SCHMIDT:** We had an emergent issue that we've been  
21 discussing with the plaintiffs that and my colleague,  
22 Mr. Imbroscio, wanted to address.

23 **THE COURT:** Okay.

24 **MR. IMBROSCIO:** Good afternoon, Your Honor. Mike  
25 Imbroscio.

1       We're here on an issue relating to a deposition that was  
2       supposed to happen today and tomorrow. It's a deposition of  
3       Miki Rothschild, who's a fairly senior Meta employee. He  
4       oversees the entire central youth product organization at the  
5       company.

6               **THE COURT:** Okay.

7               **MR. IMBROSCIO:** It's actually the third time we've had  
8       the deposition set. It was set originally in August. That was  
9       taken down, and they asked for dates in October. We gave them  
10      dates in October that they accepted. And they came to us and  
11      said, "Well, you've actually produced too many documents. We  
12      need more time." First time I've heard that in a case. And so  
13      we set on November 21, '22.

14       That date has been noticed since September 13th.  
15      Mr. Rothschild obviously has arranged his schedule both for  
16      prep and for the deposition and cleared two full days in what  
17      is otherwise a pretty busy time.

18       I, alongside several of my colleagues, came out for the  
19      deposition and the day before the deposition at about 12:50, we  
20      got a note from Mr. Cartmell who said that they're going to  
21      pull down the deposition. The stated basis was there was a  
22      document that was recently clawed back that was inadvertently  
23      produced, clawed back, and they said, "Until we get that  
24      document, we don't want to proceed on the deposition."

25       Within about 28 minutes of me getting that letter, I

1 e-mailed back to Mr. Cartmell and said, "That's the only  
2 reason? Let's get on the phone, let's talk about it. Surely  
3 we can't -- I don't want to waste these two days. If you want  
4 to fight the challenge, that's fine, I'll get into the document  
5 in a minute, but that's not a reason to stop the deposition."

6 Mr. Cartmell declined to call me back, declined to engage  
7 otherwise despite what can fairly be called imploring to do so.

8 I wanted to get on the phone with Your Honor yesterday,  
9 which I thought was a reasonable thing to do. They declined to  
10 even have an H.2. or something, whatever the equivalent would  
11 be.

12 I said, "Well, the judge's standing procedures does have  
13 emergent deposition protocol." That only applies if we're in a  
14 deposition I was told. In fact, I was accused of -- let me get  
15 this right -- violating the Court's standing order by even  
16 suggesting getting you on the phone. I've been doing this for  
17 a lot of years, Your Honor, never had that happen before.

18 So, basically, what's happened is we've now lost the  
19 chance to take this deposition. The document -- you know,  
20 there is a dispute over whether this document is privileged.  
21 It came into existence because we got a -- we got a request I  
22 think on November 5 to follow up on one of these hyperlinks and  
23 whether the document hyperlinked was this, in fact, document.  
24 The document they provided was labeled "Attorney-Client  
25 Privilege" on the front cover. It led us to think, "Hold on

1 here. Maybe something went awry." We produced, I think,  
2 about -- what? -- 8 million pages, I think a huge number of  
3 documents.

4 And I said, "Okay. Well we can -- we can sort that out  
5 but that's not a reason to hold the deposition. And if it  
6 ultimately turns out after review by the Court that it's not  
7 privileged or fully privileged as we've said, we can -- you  
8 know, we'll bring the witness back. You know, we can do it."  
9 They refused and said, "No, this is" -- essentially, as I  
10 understand their argument, it's the linchpin of the deposition.

11 We've produced over 74,000 documents for this gentleman.  
12 He is at the center of this case as it relates to youth, and  
13 they didn't proceed.

14 It's just very frustrating that this happened this way.  
15 Setting aside the imposition of the witness, which is  
16 substantial, you know, we had four lawyers out here. The  
17 client flew in from out of town to do all this. We had a tech  
18 person who was here in town for this.

19 And so I'm sort of at a loss on what we're supposed to do  
20 here. We -- the deposition, like, as you know, was coordinated  
21 with Tennessee. It was actually originally noticed by the  
22 Tennessee lawyers and then cross-noticed on the 13th by the MDL  
23 plaintiff lawyers. I would note that it was the MDL plaintiff  
24 lawyers that we'd been discussing the dates with, including the  
25 "You produced too many documents" discussion.

1       We -- when they didn't agree to get on the phone with  
2       Your Honor yesterday, we asked to see -- to talk to the  
3       Tennessee judge this morning, which we did. The Tennessee  
4       judge basically said, "You know, what am I supposed to do?"

5       The lawyer for Tennessee, even though he very candidly  
6       said, "I'm not involved in the deposition. I didn't even see  
7       the document, but I'm told by the team that it's the linchpin  
8       and we can't go forward."

9       I think the judge reasonably said, "You know, I'm here in  
10      Tennessee. I really can't force you to go forward." And he  
11      did say Tennessee was probably rolling the dice on this one;  
12      but, you know, we couldn't get the deposition to proceed today.

13      So we think that's improper. We think there ought to be  
14      consequences for it. We want to get this deposition set as  
15      quickly as we can, get a date for the witness. But we think  
16      there ought to be -- the consequences, and I'll be very  
17      straight about it, and I've communicated this relief to the  
18      plaintiffs, one is we think they ought to be docked some amount  
19      of time for the day that they wasted, five hours, seven hours.

20      Two is, we ought to pick a date that's convenient to the  
21      witness in the very near future that's his date that he can do  
22      and arrange it. We're at the end of the year, lots of business  
23      meetings. In fact, he's arranged his schedule to do the  
24      deposition these two days before things got busy at year-end.

25      And, three, I think there needs to be some sort of

1 recognition through fees and costs of going through this  
2 process.

3 I'm happy to answer any questions, including about the  
4 substance of the document, which I think is not the issue  
5 that's relevant here, although we'll certainly be prepared to  
6 deal with that in the course of the hearing.

7 **THE COURT:** Response.

8 **MR. CARTMELL:** Good afternoon, Your Honor. Tom  
9 Cartmell for the MDL plaintiffs.

10 We strongly disagree with, I guess, the characterization  
11 about what happened and, most importantly, that the deposition  
12 was postponed or the suggestion that it was postponed for not a  
13 good reason. I guess what I'd like to do, Your Honor, is  
14 respond and tell you what happened and why it mattered.

15 The documents that we're talking about were produced to us  
16 by Meta in August. Presumably at that time lawyers from Meta  
17 reviewed the documents -- right? -- and found that they were  
18 not privileged.

19 Since August at least, we have been reviewing with what  
20 I'll call the Miki Rothschild deposition team thousands and  
21 thousands of documents. They've produced I think, that's  
22 right, 70,000-plus documents. The deposition team includes  
23 lawyers from PSE firms like my firm, AG MDL lawyers, Tennessee  
24 AG lawyers, Kentucky AG lawyers, Massachusetts AG lawyers,  
25 Arkansas AG lawyers. That's the Miki Rothschild team. And



1 we've been pouring through documents for months and months and  
2 months whittling them down to prepare for this deposition so  
3 that we could have, you know, a targeted, you know, efficient  
4 examination, and we've done that over time. We were totally  
5 prepared for this deposition.

6 This witness -- let me say first, the documents that were  
7 clawed back that we're talking about in this case are hugely  
8 critical to this witness. They go to the heart of this  
9 witness' testimony, and let me give you a little bit of context  
10 about that.

11 Mr. Rothschild was the senior product director for youth  
12 safety and well-being, definitely high up, reports to Mr. Cox  
13 who reports to Mr. Zuckerberg. Very important deposition.

14 And he is credited throughout the organization by Mr. Cox,  
15 by Mr. Clegg, the highest levels, as developing the strategy,  
16 the business plan for the entire company -- it started with  
17 Instagram, but it was adopted throughout the company -- on  
18 preventing harms to kids to safety and well-being. That's what  
19 the plan was.

20 And he credits himself for that. He does a performance  
21 evaluation and he says, "What I did in 2022 was I developed and  
22 implemented the youth strategy and business plan for how we are  
23 going to handle youth safety and well-being across the family  
24 of apps."

25 So these documents that we're talking about here that were

1 clawed back are the plan. They're the business plan. They're  
2 the strategy.

3 We had set up our work and our outline for this deposition  
4 to talk about the most important factor with this witness in  
5 his deposition; and three days, business days, before the  
6 deposition occurred at 8:40 my time, that's Midwest time,  
7 6:40 here, we got a notice, a letter, saying, "The plans, the  
8 strategy" -- I think it was three documents -- "are being  
9 clawed back."

10 Now, we didn't know it at that time. That was Friday at  
11 8:40. We couldn't figure it out until Monday because it didn't  
12 go through in our DISCO system and all that. All we had was  
13 the Bates numbers, and we had to figure out whether or not  
14 these were documents we were going to use.

15 So Monday I figured out -- afternoon Monday, I think, my  
16 paralegal came in and she told me, "They clawed back two of the  
17 documents on your outline for the deposition." I went to the  
18 outline and figured out what they were. They were the plan,  
19 the strategy plan, the business plan, the heart of the  
20 deposition for him, the most important documents at that point.

21 So at that point we put together -- we gathered up  
22 everybody on the team -- the Tennessee AGs, the Massachusetts  
23 AGs, the MDL AGs -- and we got on a Zoom and we said, "What  
24 should we do? Here's what happened. It's just happened right  
25 now." And we said -- you know, talked about what we should do.

1 And at that point unanimously everybody decided it doesn't  
2 make sense to go forward with this deposition. We're taking  
3 the deposition of the guy who developed the plan, the business  
4 plan, on safety and well-being for kids and three business days  
5 before they claw it back.

6 Now, we had told them November 5th, we had sent them a  
7 letter or an e-mail saying -- November 5th we're trying to  
8 figure out if this is the same hyperlink where it says "this  
9 plan" because we wanted to make sure about that before the  
10 deposition.

11 They waited 10 days. We didn't hear a thing from them  
12 until 10 days, and at 8:40 on the 15th they clawed it back.  
13 Okay. And then we started what happened on Monday.

14 Monday evening we sent an e-mail or letter over to them  
15 saying specifically that they needed to remove the redactions  
16 and we want to have a meet and confer immediately; and that if  
17 they didn't remove them, the redactions, we were considering  
18 postponing the deposition.

19 We asked them to do it by 9:00 a.m. At 8:59 a.m., the  
20 next day -- now we're on Tuesday of this week -- 8:59 a.m. we  
21 find out from them that they're not willing to remove the  
22 redactions. They sent us the redactions and -- because they  
23 had told us that they were going to do that after that.

24 Once we figured that out and we had offered  
25 meet-and-confer times at 10:00 a.m. Midwest time for the meet

1 and confer, they said, "We're not available till 4:00 p.m."

2 At 4:00 p.m. my colleagues attended a meet and confer with  
3 I believe it was one lawyer from Meta who really didn't have  
4 any knowledge about the document or didn't seem like, I'm told,  
5 was prepared to be involved in the deposition. We were asking  
6 specifically: What's the basis for the privilege? She was not  
7 able to tell us any basis for the privilege.

8 We said at that time: We are willing to, you know, do  
9 some emergency briefing and get this before the Court and  
10 immediately reschedule the deposition of Mr. Rothschild, and  
11 they refused to do so at that point. They wouldn't do it.

12 So then -- so I get on a plane. I come out here,  
13 Your Honor, on a plane with my team. The Kentucky AGs get on a  
14 plane, they come here. Tennessee AGs are here. Massachusetts,  
15 I'm not sure. Arkansas AG is here. And everybody heads to  
16 California, you know, because we don't know specifically  
17 whether or not they're going to remove all the redactions or  
18 say, "Let's just go ahead and do it."

19 And so we get here, and I've been here since Tuesday. We  
20 all have been here. On Wednesday around mid-morning,  
21 11:00 a.m., we get the e-mail, I do, from Meta's counsel saying  
22 we want to have an emergency meet and confer and our plan is to  
23 have an emergency some sort of hearing or procedure or  
24 submission to you, Your Honor.

25 And the reply back immediately after we all got on the

1 phone, all the AGs, the entire time and the MDL AGs from the  
2 other states, and said, "Is this a procedure? Is this  
3 something? Is it in Your Honor's order to do this?" We looked  
4 at the orders, and what the order says is: During a deposition  
5 if you have a conflict and there is a problem, you can notify  
6 me and there may be an emergency procedure.

7 We responded that there's no procedure for this, and we  
8 don't believe that you have an appropriate basis to do this.  
9 We're willing to bring this up at the hearing tomorrow. We're  
10 willing to bring the document and show the document in camera  
11 to Your Honor; and if Your Honor decides that we should go  
12 forward with the deposition immediately, we're willing to do  
13 that.

14 We responded to them twice or three times yesterday. We  
15 didn't think that there was an appropriate procedure. We  
16 weren't trying to blow them off. We weren't trying to ignore  
17 them or prevent them to do something improper -- or proper, but  
18 there was no mechanism to do it at that point.

19 So, Your Honor, I guess what I would say is this document  
20 is -- we've decided as a team, and as all of us in these cases,  
21 that going forward with this deposition without these documents  
22 that are really at the heart of his testimony, that the  
23 structure of our examination is built -- you know, is built  
24 on -- there's other documents, for sure, and documents that go  
25 to the -- you know, his work up to that policy and things like

1 that, but you take his examination about: Here's the work you  
2 did, the work you did, it goes to the crescendo and there's no  
3 plan? That didn't make sense to us.

4 So we decided that it was most efficient for you to  
5 actually get a chance to hear this and then rule on this and  
6 then at that point, based on your ruling, reschedule the  
7 deposition. We took down the notice. We renoticed it for  
8 December 12th and December 13th.

9 I will say this, Your Honor: There is absolutely no  
10 incentive -- and I'm not sure what Meta's counsel is saying our  
11 motive would have been or our incentive would have been to pull  
12 this deposition out. We're ready for this deposition. We're  
13 here. We'd spent months preparing. I can tell you, personally  
14 this is horrible for me to reschedule this deposition.

15 In the MDL we have all kinds of work we have to get done.  
16 I have other depositions that I have to get done that I'm  
17 assigned to, and this jams a lot of stuff for us. There was no  
18 reason for us to pull this down.

19 And the other thing I would say is, two weeks ago, a  
20 little over two weeks ago, we got a letter from defense counsel  
21 saying, "Heads-up, we're not going to have produced all of  
22 Miki Rothschild's documents by the time of his deposition, and  
23 so you better understand that and I recommend that we  
24 reschedule that to January 30th and 31st." This was their  
25 recommendation because they were telling us, "If you take the

1 deposition and you know that we're not going to have given you  
2 all the -- you're taking it at your own risk and we're not  
3 going to let you take the deposition again."

4 Now, we didn't agree with that obviously, but we decided  
5 at that time, we turned him down. We said, "No. We're ready  
6 to go. We're going to take the deposition." So I think that  
7 shows there was no reason for us to just bail on this  
8 deposition.

9 As far as his comment that this has been taken down twice  
10 before, I totally disagree with that. That was -- one of those  
11 was, as you'll recall, we were working through a new discovery  
12 order and timing of the custodial file productions, and it just  
13 so happened that his fell so early that there was no way we  
14 were going to have the documents. So that wasn't just us.  
15 That was an agreement between the parties that we would push it  
16 back.

17 Now, you know, this document, we believe strongly, is not  
18 privileged. We are prepared as soon as possible, Your Honor,  
19 as you want us to, and we'll file briefs, we'll go through the  
20 process, and we'll set the deposition as soon as possible. We  
21 don't want any more delay than that.

22 **THE COURT:** Can you get me a letter brief tomorrow?

23 **MR. IMBROSCIO:** We have -- we worked over the last  
24 24 hours to get you the relevant affidavit or declarations. We  
25 have the documents we can hand to you right now.



1 Here's the problem: That's what we were prepared to do.  
2 They got signed this morning. But that's what I wanted to  
3 happen yesterday. We could have begun the deposition today,  
4 had this hearing in the afternoon; and if Your Honor found the  
5 document, you know, needed to be redacted less or produced in  
6 its entirety, we could have done that for the day two, but  
7 we've now lost that opportunity and that's what's incredibly  
8 frustrating, why we wouldn't even just get on the phone and we  
9 could just call Your Honor. That's the way professionals are  
10 supposed to act, and that's not what happened.

11 And it's very, very frustrating because, as Mr. Cartmell  
12 said, this jams up all our schedules, including the witness'  
13 schedule but also all of our schedules. We are jam packed.  
14 There's not a free day on most of our schedules between the  
15 depositions and the preparations and the travel to do all this  
16 work in the next four months.

17 **THE COURT:** Do you-all remember, I think it was the  
18 first or second DMC, I asked you: Did you have a schedule for  
19 when you were going to start talking about depositions? And  
20 you-all looked at me like I was crazy; right?

21 **MR. IMBROSCIO:** That's why in these cases depositions  
22 are scheduled two months out. That's why this has been noticed  
23 since September 13th.

24 I'm actually surprised a lot of orders in cases we have  
25 have a no cancellation within three days' period provision.

1 This doesn't for whatever reason.

2 But let me just respond to two things that -- first, this  
3 suggestion that we just willy-nilly said we weren't going to  
4 produce all the documents by his deposition left out a pretty  
5 crucial fact. This was a brand-new document request that came  
6 in earlier that month on teen accounts. Of course, we said  
7 it's not going to be available. We said, "Hey, as you probably  
8 imagine, these documents aren't going to be ready. We can move  
9 it." This was a month ago. "We'll move it, but let's do it  
10 now so we don't waste time." They said, "We're going to move  
11 forward." That's fine. You know, you can take your chances  
12 there. So the suggestion that we somehow don't care about this  
13 date is just wrong.

14 We're talking about basically one document. It's  
15 different versions of the same document. The notion -- I think  
16 in our clawback letter we pointed out the fact that there were,  
17 in fact, lawyers involved and we identified the lawyers because  
18 it did not appear on the face of the document, even though the  
19 face of the document cover pages you'll see has  
20 "Attorney-Client Privilege" on it.

21 And like a lot of things, there's a complicated story with  
22 the document, which was laid out in the affidavits. But, like,  
23 that's almost beside the point, Your Honor. Like, there are  
24 always going to -- discovery is not perfect. There are always  
25 going to be issues.

1        You know, yeah, we did produce these documents in August,  
2        but it was their inquiry that led us to realize, "Hey, a couple  
3        versions of this document were produced." A number of them are  
4        already on the privilege log. It's not like there was some  
5        affirmative decision. This was a mistake. Someone didn't look  
6        at this document the right way. That happens. Discovery is  
7        not perfect.

8        But we can't live in a world where if we don't have an  
9        absolute perfect deposition, you know, set of documents, you  
10       know, we can't proceed.

11       As a general matter, these folks have been using between  
12       40 and 50 exhibits even for the last couple depositions this week,  
13       and there have been -- there were two earlier depositions this week;  
14       one that I defended and one that I attended partially. I think  
15       they used 35 or 40 exhibits in each one. So the notion that  
16       one document, even as crucial as Mr. Cartmell suggests it was  
17       to their entire theory of this case or this deposition, that's  
18       not a reason to do this.

19       At a minimum, we should have been on the phone with  
20       Your Honor to get it done, and that's -- I'm expressing  
21       frustration as you can tell, but that's -- I don't think it was  
22       appropriate what happened here.

23       **MR. CARTMELL:** Your Honor, briefly, if I may respond  
24       to that.

25       **THE COURT:** Very briefly.

1           **MR. CARTMELL:** Yes. First of all, we offered to  
2 brief. They refused.

3           The other thing is these documents are not the same  
4 document. They're not the same document. He said that they  
5 were two of the same, just a little bit different. They're  
6 totally different documents. They're totally different  
7 documents.

8           **THE COURT:** Wait. Just so I'm clear, is it one  
9 document that was clawed back or --

10          **MR. CARTMELL:** Three documents.

11          **THE COURT:** Three documents.

12          **MR. CARTMELL:** Two of them apply to Mr. Rothschild.

13          **THE COURT:** Okay.

14          **MR. IMBROSCIO:** It's three versions of a PowerPoint  
15 presentation. One is 50 pages --

16          **MR. CARTMELL:** That's not true. One is 50 pages. One  
17 is 47 pages. One is Phase 1 of the business plan. One is  
18 Phase 2 of the business plan.

19          I've lived with this document for, you know, months. I  
20 know this document in and out, and we can't talk about it, I  
21 get it, but that's what these documents are.

22          The other thing, Your Honor, is part of our -- because he  
23 brought this up, part of the reasoning, you know, that we felt  
24 unanimously among all of us lawyers on this team was because we  
25 were concerned about gamesmanship as well. If three-day --

1 business days before a deposition when they know the documents  
2 that we are going to use -- this whole hyperlink thing is  
3 really strange to me because I've never gone through it; right?  
4 They're a tech company, they use hyperlinks. We have to ask  
5 them for hyperlinks to prepare for a deposition so they know  
6 what documents we're going to use; right?

7 So we sent them a hyperlink. We said, "We're going to use  
8 this document." They knew it. Ten days later right before the  
9 deposition we get a claw back.

10 Part of it is gamesmanship, and we don't want that  
11 continue happening. And, frankly, this is a bigger subject on  
12 the whole issue of overuse of redactions that is being  
13 exhibited in this case.

14 So this idea that nobody can cancel a deposition three --  
15 three days in advance, you know, we're concerned about the  
16 gamesmanship that nobody can claw back a document that just --  
17 they know we're going to use it, and it gets clawed back right  
18 before a deposition when it's the most -- you know, some of the  
19 most important documents in the case.

20 **THE COURT:** So the primary gating item is to figure  
21 out whether that document is privileged or not, right --

22 **MR. CARTMELL:** Yes, Your Honor.

23 **THE COURT:** -- as I understand?

24 So can you get me a letter brief on it tomorrow? Is that  
25 too soon or can you do it Monday?

1           **MR. CARTMELL:** I was asked to ask for Monday.

2           **THE COURT:** Okay. Monday. Letter brief on Monday on  
3 the privilege issue. I will prioritize getting to it.

4           In the meantime, on the assumption that I work as quickly  
5 as I can to decide that issue, and it may not be the world's --  
6 it won't be a 258-page order, can you nail down another date  
7 for Mr. Rothschild's deposition?

8           **MR. IMBROSCIO:** We are working very closely with him  
9 because of the upheaval this has caused. The dates that they  
10 suggested can't work. We don't want to let it slip into the  
11 new year because he's already prepared. You know, we're  
12 looking at dates the first two full weeks of the month.

13           **THE COURT:** January?

14           **MR. IMBROSCIO:** No, of December. We want this to  
15 happen in a week. You know, hopefully a week -- either a week  
16 from this Monday or two weeks from this Monday or Tuesday, but  
17 I should say, the witness is still trying to arrange his  
18 schedule. But our view is the date that the witness says it  
19 should happen, it should happen.

20           And, frankly, like, that is, as you say, the primary  
21 gating mechanism as to what's -- but in many ways that's not  
22 the real issue here. The real issue is they shouldn't be  
23 allowed to do this. Like, this is -- okay. I'm sorry.

24           **THE COURT:** So let's take everything one step at a  
25 time.

1           So, first, get me the letter brief on Monday. I will try  
2 to decide that as quickly as possible.

3           Why don't you also just put a notice, a joint notice, on  
4 the docket just so I know when his deposition is going to be  
5 actually going forward --

6           **MR. IMBROSCIO:** Okay.

7           **MR. CARTMELL:** Okay.

8           **THE COURT:** -- on the renote date.

9           Once all that dust is cleared on that issue, if both sides  
10 want to file motions under Rule 37 or otherwise or a motion for  
11 protective order or want to raise it as a procedural issue in  
12 the DMC, you're free -- I mean, you're free to do whatever you  
13 think is appropriate.

14           On -- but I will give you this guidance; right? In the  
15 local rules, there is local rule, I'm forgetting the number, on  
16 ex parte motions; right? And so that -- there is a procedure.  
17 It's not in my standing orders, although I think my standing  
18 orders refer to the local rules. There is a mechanism to get  
19 to a Court or a judge quickly, not by phone but, you know,  
20 outside of kind of the ordinary schedule of briefing things.  
21 So there is a mechanism to do that built into the local rules,  
22 and so I would just remind you-all that that exists.

23           **MR. IMBROSCIO:** We're certainly aware of that but, I  
24 mean, we were talking about we had two hours to try to get this  
25 resolved, and that would have been very -- I mean, our view is



1 that would have been very challenging.

2 **THE COURT:** Usually my experience is it's like two  
3 pages long -- right? -- and they usually get sent to the  
4 chambers quickly once they're filed. I'm just saying there's a  
5 mechanism to try to get to a judge on short order and so -- go  
6 ahead.

7 **MR. CARTMELL:** Can I say one thing so I don't get  
8 balled out by "I meant to say this"?

9 There was a mention of A-C privilege being on the  
10 document. I just want to say, they've produced 9,300  
11 A-C privilege documents that aren't clawed back or aren't  
12 privileged. Obviously the law is that that doesn't determine  
13 whether a document in the Ninth Circuit is privileged or not.

14 **MR. IMBROSCIO:** Of course.

15 **THE COURT:** Right. So whoever gave you that note, you  
16 may want to talk to them after this too because that didn't  
17 advance the ball, I don't think.

18 **MR. CARTMELL:** I will, Your Honor. Thank you.

19 **THE COURT:** Okay. So let's get the document squared  
20 away, the depo taken, and we'll deal with whether people  
21 really -- after things have simmered down a little bit, whether  
22 people really want to go for fees and costs under Rule 37, and  
23 otherwise we can talk about that. Okay?

24 **MR. CARTMELL:** Thank you, Your Honor.

25 **MR. IMBROSCIO:** The fees and costs, like one of the

1 relief -- pieces of relief we thought was just they -- they  
2 should reduce the amount of time.

3 **THE COURT:** If you want to pursue that, you're  
4 certainly -- I can't stop you. Certainly that's, you know,  
5 your prerogative.

6 Okay. Anything further on that particular issue?

7 **MR. CARTMELL:** No, Your Honor. Thank you.

8 **THE COURT:** So don't except -- I'm not going to call  
9 you here on Thanksgiving for a hearing on that motion.

10 **MR. CARTMELL:** Okay.

11 **THE COURT:** So I'll decide it on the papers. I assume  
12 the parties are okay with that.

13 **MR. CARTMELL:** Yes.

14 **MR. IMBROSCIO:** Yes, Your Honor.

15 **THE COURT:** Okay. All right. So we've done that.  
16 We've done that. We've done that.

17 Ah, so you submitted a stipulation to me saying, "Judge,  
18 your DMC statements are too cumbersome and burdensome and all  
19 that so here's the format we want to use," but you didn't  
20 really follow the format that you proposed. You mixed up ripe  
21 and unripe disputes all over the place.

22 And anybody here understand the term "UX" or "UI"? From a  
23 UX perspective, this was not a good user experience for me to  
24 use because, unlike the previous format, which very clearly  
25 delineated things that need Court action at the DMC versus

1 things that are on the horizon, you kind of jumbled things up.  
2 Right?

3 So verbally -- I don't think I need to do this --  
4 right? -- what I expected was for you to keep kind of the  
5 overall structure of: Here's the ripe stuff and here's the  
6 unripe stuff.

7 And I understand, most of the ripe stuff you want to be in  
8 the letter briefs and you just say, "See letter brief." Right?  
9 But there is stuff in here ripe, I guess, like the whole  
10 dispute over scheduling -- right? -- which was essentially a  
11 ripe dispute. And so it would have helped me if -- or at least  
12 a dispute that one side or the other wanted me to take action  
13 on at this DMC. Okay?

14 Whereas, a bunch of these you kind of -- you listed  
15 disputes and you said, "There's an ECF here, but there's a  
16 joint letter brief forthcoming and there's a joint letter brief  
17 forthcoming," and I -- that's not helpful.

18 So separate out stuff that I need to focus on as ripe and  
19 stuff that's on the horizon as unripe. Okay?

20 **MR. WARREN:** Very well, Your Honor. Previn Warren for  
21 the School District plaintiffs.

22 I'm happy to fall on the sword for that. That was kind of  
23 a collective fever dream of myself and Ms. Simonsen to  
24 reimagine the DMC statements. We thought we had nailed it, and  
25 we clearly did not.

1 I will say, you know, part of the effort was try to  
2 identify things we thought we would have to speak with you  
3 about and subsequently got resolved, and so that's why they  
4 show up on the statement as JLB forthcoming, but nothing was  
5 forthcoming because we were able to sort it out following Your  
6 Honor's, you know, guidance that the parties sought.

7 **THE COURT:** Let me ask you something. If you file  
8 a -- like, this gets filed like a week before the DMC; and if  
9 you file a letter brief, like, two days before the DMC, do you  
10 really expect me to have the time to be able to get to it? I  
11 might.

12 I think I've told you this multiple times in the past.  
13 I'm going to use my discretion to decide whether or not I'm  
14 going to hear something at the DMC or not; but as a  
15 practical -- if you file it on noon -- like, at 11:00 a.m. the  
16 day of a DMC, you know what I mean? So --

17 **MR. WARREN:** Fair enough, Your Honor. We hear you.  
18 We will -- we'll continue to work to iterate this and improve  
19 the UX. I think the hope is that --

20 **THE COURT:** If it's joint letter brief forthcoming,  
21 I'd put that in the unripe section --

22 **MR. WARREN:** Sure.

23 **THE COURT:** -- because you've defined ripe as things  
24 where the joint letter brief has been filed, as of the date --

25 **MR. WARREN:** Sure.

1           **THE COURT:** -- of the statement, and you could always  
2 update me. And I'll see it on the docket if you filed  
3 something.

4           **MR. WARREN:** Sure. Very well.

5           Your Honor, truth be told, I think both parties were  
6 aligned in not even listing unripe issues because of the  
7 potential confusion that could cause, and we would be  
8 comfortable returning to that. I think we were trying to be  
9 responsive to Your Honor's edit to the proposed order.

10          **THE COURT:** No. I mean, even though the bullet points  
11 are quite pithy and actually give very -- the point on the  
12 unripe issue is if I do spot something that I think I can give  
13 you guidance on, I'm hoping to, you know, head something off at  
14 the path before it turns into a letter brief or something  
15 later. That's all. Nothing jumped out on this one.

16          **MR. WARREN:** Makes sense, Your Honor. I will just  
17 note every additional word or section we add to this is another  
18 opportunity for the parties to fight and not advance the ball.  
19 So if it isn't informative to Your Honor, I think all things  
20 being equal, we'd prefer to just drop it; but, of course, if it  
21 is informative, then we'll keep it.

22          **THE COURT:** I guess it's an in-case thing on the  
23 unripe -- listing the unripe stuff by bullet point and it can  
24 be -- it should be neutrally phrased -- right? -- so you're not  
25 arguing the unripe issues to me. So I just want to know what

1 the issue is.

2 **MR. WARREN:** Yeah.

3 **THE COURT:** Okay.

4 **MR. WARREN:** Very well, Your Honor.

5 **MS. SIMONSEN:** Understood. Thank you, Your Honor.

6 **THE COURT:** Think of it, you know, as an appellate  
7 brief, like, you know, question presented; right? This is the  
8 question.

9 And then you've got this other category of -- I forget  
10 what the stipulation said -- like administrative issues you  
11 want to talk about with the Court; right? And some of that is  
12 like, you know, giving me status reports on, like, forensic  
13 imaging and things like that.

14 But the schedule -- like, the schedule thing -- right? --  
15 that's more of an administrative issue. It wasn't a joint  
16 letter brief or whatever.

17 So what I would, again, ask you, if you're going to have a  
18 section on administrative reporting on stuff, separate --  
19 sub-separate that out on things that are disputed that I need  
20 to act on versus stuff you're actually just reporting on.

21 **MS. SIMONSEN:** Understood, Your Honor.

22 **MR. WARREN:** Understood. So if we had a section that  
23 things just reporting on ripe disputes, bullet points of other  
24 miscellany, does that work?

25 **THE COURT:** Well, so administrative issues; right?

1 Things you're reporting on, that's all you're doing. Right?

2 **MR. WARREN:** Right.

3 **THE COURT:** Disputed issues that are administrative in  
4 some way, they're not really a discrete truly discovery  
5 management writ large; right? And then maybe something --  
6 that's on the administrative section.

7 And then truly ripe discovery disputes -- right? -- just  
8 list those out for me in whatever way you want if they've been  
9 letter briefed -- right? -- and then the unripe disputes.

10 **MR. WARREN:** Okay. So four sections. I think I got  
11 it.

12 **THE COURT:** I think that's right.

13 **MR. WARREN:** All right. Very well. Thank you,  
14 Your Honor.

15 **THE COURT:** Did I miss anything? Okay.

16 All right. So that's that.

17 Questions on the -- all right. You know, like  
18 Silicon Valley engineers, we're going to iterate this.

19 **MR. WARREN:** V3.0.

20 **THE COURT:** That's right.

21 Okay. Ah, so I saw that the TikTok case has been folded  
22 into the MDL by Judge Gonzalez Rogers' order yesterday? Today?  
23 It's been related at least; right?

24 **MR. WARREN:** It's been related, and I'll let the State  
25 of California address that.

1           **THE COURT:** Yeah. The only question I have is: How  
2 does that affect what we do here, if at all?

3           **MR. WARREN:** I will let the representative of the  
4 People take that one. Thank you.

5           **MR. DRAKE:** Geoffrey Drake, King & Spalding, for the  
6 TikTok defendants.

7           My colleagues from O'Melveny & Myers -- excuse me -- are  
8 handling the AG cases and will be here tomorrow to discuss that  
9 with Judge Gonzalez Rogers, I imagine, from the correspondence  
10 that's occurred so far and the opposition to the administrative  
11 motion that the State begins to commence by filing a motion to  
12 remand, which we'll be opposing, and that will be the first  
13 step. And I don't know how Judge Gonzalez Rogers intends to  
14 handle that.

15           I believe TikTok then, if the case is not remanded, would  
16 intend to file some motion to dismiss; but I believe the  
17 parties would, in that instance, then also confer on exactly  
18 what Your Honor asked about, which is: How will this case fold  
19 into the ongoing discovery?

20           **MS. O'NEILL:** Megan O'Neill for the People of the  
21 State of California.

22           I don't think I have anything to add beyond that. That's  
23 an accurate statement of the status, and we'll be prepared to  
24 discuss with Judge Gonzalez Rogers tomorrow.

25           **THE COURT:** Okay. So I -- probably for the next DMC



1 statement then, I'm going to expect to see some call it an  
2 administrative report on TikTok and California's plan on how to  
3 fold TikTok -- what the discovery plan is for folding TikTok,  
4 that case, into this case; right? Whether it's by stipulating  
5 to all the discovery, you know, that's already taken care of  
6 and there's no additional discovery that needs to be taken.

7 I don't know what you're going to work out, but some  
8 inkling to me as to how -- what I'm going to be faced with over  
9 the next six months with regard to this complication. Okay?  
10 And I just want a plan from both of you on that.

11 **MR. DRAKE:** Absolutely, Your Honor. Understood.

12 **THE COURT:** All right.

13 **MS. O'NEILL:** And, Your Honor, just one note on that.

14 We -- as counsel mentioned, we do have a pending motion  
15 for remand. We don't think that the Court has jurisdiction  
16 over this case, and so we will be pursuing that and that  
17 position will be reflected in any report that we provide to the  
18 Court as ordered.

19 **THE COURT:** Sure. That's Judge Gonzalez Rogers'  
20 business, not mine. So all I care about is whether -- how I'm  
21 going to handle any discovery if you stay in the case. That's  
22 the main issue.

23 **MR. DRAKE:** Thank you, Your Honor.

24 **MS. O'NEILL:** Thank you.

25 **THE COURT:** All right. And just to be clear, just

1 because you submit a discovery plan for me doesn't prejudice  
2 your rights to -- on the remand. I don't think anybody is  
3 going to take that position.

4 **MS. O'NEILL:** Understood. Thank you.

5 **THE COURT:** Okay. There's that.

6 Oh, so in the briefing on the discovery schedule and plan  
7 for the State AGs, there was reference made to the fact that I  
8 had approved the stipulation between plaintiffs and the  
9 bellwether school districts that gave a little bit of extension  
10 of time, at least in terms of deadlines for depositions, in  
11 those cases.

12 I mean, if people are going to -- I'm not here to change  
13 Judge Gonzalez Rogers' deadlines. Right? And so I did that  
14 because it was a stipulation and all that; but if people are  
15 going to rely on that to try to blow past her deadlines  
16 generally in the case, that is not my -- that was not my  
17 intention and you should not do that. Okay? Otherwise I will  
18 seriously consider reconsidering that order and changing it  
19 from May 15th back to April 4th for the depo deadline. Okay?  
20 Understood?

21 All right. You haven't heard from South Dakota yet, have  
22 you?

23 **MR. COCANOUGHER:** I just checked, Your Honor. Now my  
24 cell phone service is not great here, but I will continue to  
25 check.

1           **THE COURT:** Okay. All right.

2           Oh, yeah, so proceeding along. So the next -- so I think  
3           the next several DMCs are set, but we didn't set one in  
4           April 2025 yet. So it will be April 24th, which will be the  
5           day after the CMC that month, again at 1:00 o'clock here.

6           Did you want to report on the results of the meet and  
7           confer? Did you complete it yet?

8           **MS. SCULLION:** Yes, Your Honor. Thank you. We did --  
9           Jennifer Scullion for the PI/SD plaintiffs.

10          We did meet and confer, and we have a proposal on the  
11          table that's being considered in terms of a stipulation to, we  
12          think, potentially resolve the issue.

13          **THE COURT:** Perfect.

14          **MS. SCULLION:** So we hope to report back with good  
15          news.

16          **THE COURT:** Okay. Great.

17          **MS. SAFFARINI:** Thank you, Your Honor.

18          **THE COURT:** Thank you for that.

19          All right. Oh, and I forget -- the other -- going back to  
20          that stipulation on the bellwether school districts, consistent  
21          with my encouraging parties to try to work things out, when I'm  
22          presented with stipulations, I try not to tinker with them.  
23          Because if you've worked them out, that's what I've been urging  
24          you to do, so I don't think it's my job at that point to meddle  
25          in the stipulations. So that's the reason why I don't think

1 anybody should take that as me trying to overrule or change  
2 Judge Gonzalez Rogers' fact discovery cutoff date.

3 Okay. Anything from the plaintiffs?

4 **MS. HAZAM:** No, Your Honor.

5 **THE COURT:** Anything from the defense?

6 **MR. LEVIN-GESUNGHEIT:** For the PI/SD plaintiffs,  
7 Michael Levin-Gesungheit from Lieff Cabraser.

8 I do have one thing to bring up as a follow up from last  
9 time about Snapchat. Is there counsel for Snapchat here?

10 Okay. Well, I don't think it's fair to bring up without  
11 their counsel, but we are -- I guess I would just note for the  
12 record, following Your Honor's ruling both orally and in  
13 writing, Snapchat has confirmed that it has not retained copies  
14 of HipChat documents from multiple litigations; but at the last  
15 hearing it noted that it had a production to the DOJ and that  
16 it was reviewing it for relevance.

17 And we have not been able to obtain an update about when  
18 exactly we will get those documents, and so we are hoping that  
19 Snap will provide them. It's been quite some time. I  
20 recognize Snap cannot respond right now, so I guess I'll just  
21 state that for the record.

22 **THE COURT:** Well, when -- they're going to be --  
23 somebody for Snapchat is going to be here tomorrow, right, for  
24 the CMC presumably? Right? And are you going to be here  
25 tomorrow?

1           **MR. LEVIN-GESUNGHEIT:** I'll -- we can continue to  
2 confer with Snap. We were hoping to get a little prodding from  
3 Your Honor, but we're in the situation we're in, so that's all  
4 I got.

5           **THE COURT:** Okay.

6           **MR. LEVIN-GESUNGHEIT:** Your Honor, I see that I  
7 believe Ms. Teller might have her hand up on Zoom. She's one  
8 of Snap's counsel.

9           **THE CLERK:** Would you like me to promote her?

10          **THE COURT:** Yeah, could you please?

11          If there's Snap's counsel on the line, that's even better.

12          So is somebody on Zoom who wanted to chime in?

13          **MS. TELLER:** Yeah. This is Faye Paul Teller from  
14 Munger, Tolles & Olson. I'm sorry, I don't have video on.

15          I just got a notification because I had not able to join,  
16 but I understood an issue was raised. If it is possible -- I  
17 understand this may be related to HipChat. If it is possible  
18 to meet and confer tomorrow, we will have folks at the CMC.

19          So I'm happy to answer any questions that I can right now.

20          **THE COURT:** It looks like you ought to meet with them  
21 at the CMC tomorrow.

22          **MR. LEVIN-GESUNGHEIT:** We're happy to continue meeting  
23 and conferring. I mean, all we're looking for is just a date  
24 certain by which this will be completed. We think perhaps a  
25 court order will get that done. It's been a really long time.

1 That's all this is really about.

2 **MS. TELLER:** I apologize. It's a little hard for me  
3 to hear.

4 I think I hear a question being posed about finishing the  
5 negotiation on the HipChat issue; is that right?

6 **THE COURT:** I think the question is that there was a  
7 production of HipChat data or messages found in a production to  
8 the DOJ that was being reviewed for relevance and privilege, I  
9 assume, and I guess the question is: When will that be  
10 completed so that those HipChat -- that HipChat data can be  
11 produced?

12 **MS. TELLER:** I understand from my colleagues that  
13 we're reviewing it and it's in process. I don't have a firm  
14 date that they plan to produce it. Although I'm sure,  
15 Your Honor, if you order something, we'll make sure to comply  
16 with that.

17 But I apologize, I'm not terribly informed on this issue.  
18 I obviously did not realize it was going to be raised at this  
19 DMC.

20 **THE COURT:** Okay. Why don't you -- why don't you --  
21 whoever for Snap is at the CMC tomorrow, confer with  
22 plaintiffs' counsel whoever is there tomorrow to just try to  
23 between now and then come up with a firm date that you can  
24 propose that you'll definitely be done by. Okay?

25 **MS. TELLER:** Of course, Your Honor.

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Saturday, November 23, 2024

A handwritten signature in black ink, reading "Kelly Shainline". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Kelly Shainline, CSR No. 13476, RPR, CRR  
U.S. Court Reporter



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1 current budget stuff or current things. So I want you to meet  
2 and confer, and you may have to either redo the notice or at  
3 least say, by agreement, which topics go back to 2012 and which  
4 don't just so that the states can adequately prepare their  
5 witnesses, knowing which ones this is really an issue in.

6 On the general objection by the states that the relevant  
7 time period shouldn't go back to 2012, I'm going to overrule  
8 that just generally because, as a blanket objection, I don't  
9 think it's appropriate. I think it's -- the real --  
10 procedurally, the practical thing is, for some of these, if  
11 Meta insists on asking questions that go back to 2012 or '13  
12 and the state no longer has that information, then the normal  
13 30(b)(6) answer is "We've investigated and we don't have that  
14 information. So as a party, we don't know because it's too  
15 old." Right?

16 **MR. RICHARDS:** Understood, Your Honor.

17 **THE COURT:** All right. So I'm not going to bar the  
18 deposition on that ground. A lot of it is going to be topic  
19 and question dependent and based on what preparation each state  
20 is able to do for their witnesses, and I'm assuming they're  
21 going to do the required preparation for each of their  
22 witnesses.

23 And then on the issue of whether this implicates the state  
24 agency control issue that was part of -- a large part of the  
25 discussion in discovery disputes last year, I think that's a

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1 red herring and it's irrelevant.

2 The 30(b)(6) notice is addressed to each state as a state,  
3 as a party; it's not addressed to the agencies. And so as the  
4 responding party to the deposition notice, it is up to each  
5 state, as a party, to decide whom they want to pony up and  
6 present as the representative witness for each topic. And so  
7 it may be an agency person; it may not be an agency person. It  
8 may require talking to an agency person; it may not require  
9 talking to an agency person.

10 But this is not -- they're not trying to get at discovery  
11 from an agency by these notices. They're asking the state to  
12 provide a witness. And it's up to the state to decide who they  
13 want to provide. It's totally within your control. Okay?

14 **MR. RICHARDS:** Okay. I would just ask, Your Honor,  
15 there's an underlying question here about the bindingness of  
16 the testimony from a state agency. I think it also relates to  
17 the overbreadth issue that we've raised just on the plethora of  
18 topics in the notice.

19 And so insofar as the state AGs would be putting up  
20 witnesses from other agencies who might have agency-specific  
21 information, it would be helpful to understand the bindingness  
22 of that testimony on the litigants.

23 **THE COURT:** Again, that's not how Rule 30(b)(6)  
24 works. You present a witness on behalf of the state --  
25 right? -- the party, to testify on behalf of the state. It may

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1 or may not be an agency person; it may be -- it may be  
2 somebody -- it could be -- I mean, I've seen cases where people  
3 put up expert witnesses. It could be whoever you choose.

4 That person has to then be prepared to answer questions on  
5 that particular topic. Now, of course, it is often the case  
6 that sometimes the topics are so broad that it requires an  
7 encyclopedic knowledge of an individual and it's -- they may  
8 not know everything that comes up at the deposition; but they  
9 do need -- they're under an obligation to be prepared to answer  
10 questions on that topic.

11 And so it is -- to the extent they're able to answer after  
12 adequate preparation, then that is binding in the sense that  
13 they're representing the state and they were prepared by the  
14 state to talk on that topic. I don't care whether they're an  
15 agency person or not. It's up to you whether they're an agency  
16 person or not. It's not up to Meta. It's not up to me.

17 And if the answer is "Well, that's such a detailed  
18 question, there's no way to prepare to answer that but we'll  
19 try to get" -- the usual thing -- "we'll try to get you that  
20 answer later," that's usually what happens. And sometimes the  
21 answer is "We looked into that and we just don't know. As a  
22 party, we take no position on that." Right? Because it's  
23 just -- it's a weird detail that nobody has ever looked into or  
24 is incapable of knowing. I mean, it really depends on the  
25 question. All right?

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1 But in terms of bindingness, the way 30(b)(6) works is you  
2 pick the witness who's going to bind -- quote, "bind,"  
3 represent the party on a particular topic; and it could be --  
4 it looks like it could be multiple people, each one with a  
5 different set of topics. Right? And it's up to you to prepare  
6 them adequately.

7 **MR. RICHARDS:** I would just also -- I think we -- the  
8 state AGs have, you know, compared the -- you know, reviewed  
9 Your Honor's order from September 6th and looked at the  
10 language of Rule 30 and Rule 34; and I think this, you know,  
11 concerns the language in Rule 30 about reasonably available and  
12 the difference in scope under those two rules.

13 And so I think our position would be that soliciting the  
14 information which might be within the agency's knowledge would  
15 go -- would not be reasonably available to the AGs just based  
16 on the way those topics are written.

17 **THE COURT:** Again, you're misunderstanding. This is  
18 where I said I think it's a red herring; it's a misnomer.

19 Under Rule 30(b)(6), the party here -- it's not the  
20 state AG -- I mean, there's a couple of states where the AG is  
21 the party, but for the most part, the state is the party;  
22 right? And the state has a responsibility as a party to  
23 identify a person to testify on behalf of that party with  
24 regard to that issue. Right?

25 And it is often the case in very large corporations, very

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1 large entities, whoever that person is, they may need to talk  
2 to multiple people and review multiple documents to be prepared  
3 to testify on that topic. Right? But that's not some untoward  
4 way of getting discovery from those people who they talk to to  
5 prepare for. That's the normal process. Right?

6 **MR. RICHARDS:** I understand that, Your Honor. And I  
7 would just -- you know, and not to reargue the briefing, but  
8 I think -- we're not aware of any situation where a state has  
9 been designated in this way, where multiple agencies have been  
10 wrapped up.

11 The definition, you know, of the responding parties in the  
12 notice does apply to those agencies in your September 6 order.  
13 And our review of the case law, including cases Meta cited,  
14 we're not aware of any situation where multiple agencies are  
15 wrapped up into one 30(b)(6) notice, even if the party is a  
16 state.

17 In those instances in the cases we've reviewed, they're  
18 distinguishable because the agencies have either received a  
19 notice themselves or, in the corporate context, the facts have  
20 been so different and the notices, again, in those cases have  
21 been to one entity. So we're not aware of any case law or --  
22 you know, that says that multiple entities could be wrapped up  
23 in that one 30(b)(6) notice.

24 **THE COURT:** That happens all the time. You send a  
25 depo notice, a 30(b)(6) depo notice to a conglomerate, General

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1 Electric, and they've got to pony up a witness to speak on  
2 behalf of the conglomerate.

3 I mean, it may require talking to other people to prepare.  
4 That's the whole purposes of Rule 30(b)(6). As a party, you're  
5 supposed to find someone who can be prepared. We're not  
6 dealing with California state law where it's got to be the  
7 person most knowledgeable. Right? You've got an obligation to  
8 prepare the person -- reasonably, of course -- right? -- to  
9 answer questions on the topic. Right?

10 And so, again, it's not -- there's no wrapping up of  
11 people -- of agencies as a party here. That's why I think the  
12 argument and that line of discussion is really orthogonal to  
13 this because under Rule 30(b)(6), the witness is just supposed  
14 to talk to whoever they need to. Again, it may not be an  
15 agency. They may just be able to prepare to answer the  
16 question based on review of some documents. I don't know.  
17 Right? And it's going to depend topic by topic.

18 But I think trying to posit that this is an attempt to get  
19 at depositions of agencies is -- starts with the wrong  
20 supposition -- right? -- because, again, it's up to you to  
21 decide how to prepare the witnesses best -- right? -- and it  
22 may or may not include agencies.

23 **MR. RICHARDS:** I understand that, Your Honor.

24 And I would just also say that, you know, perhaps using  
25 your General Electric example, the states don't view themselves

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1 as such a monolithic entity.

2 And just to use Kentucky as an example, you know, as  
3 opposed to, like, the federal government or something like  
4 that, these are dual executives. Kentucky is a state that has  
5 one party of a Governor and one party of an Attorney General.  
6 And so we think sort of forcing them to come together and make  
7 a statement on behalf of the state or take a position on behalf  
8 of the state, as an entity, would not account for that  
9 dual executive function and the fact that there might not be a  
10 coherent statement to provide on behalf of the state *qua* state.

11 **THE COURT:** Well, I think partially that argument has  
12 been rejected in the previous motion. I know it's under  
13 Rule 34, but that concept was previously rejected.

14 And, again, here, the state is the entity that's the  
15 party. Right? And, again, as a party -- because I took out  
16 the contention topics, most of what's left is just factual.  
17 And as a party, you have to be able to answer factual questions  
18 if you know -- right? -- if the party knows. Right?

19 And sometimes a party as an entity, a corporation, a large  
20 entity, a government entity, takes a position that it doesn't  
21 know -- right? -- or it takes no position, or it's done a  
22 reasonable investigation and can't find that information.  
23 Right? Again, it's going to be very question specific and it's  
24 going to be very topic specific.

25 And, again, I'm going to leave it up to you to, you know,